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No. 12483

United States
Court of Appeals
for the Ninth Circuit.

ALBERTY FOOD PRODUCTS CO., a Copartnership consisting of ADA J. ALBERTY, HARRY R. ALBERTY, HELEN M. ALBERTY HACKWORTH, KENNETH J. HACKWORTH, FLORENCE M. ALBERTY ST. CLAIR and MARGARET M. ALBERTY QUINN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Apostles on Appeal

Appeal from the United States District Court Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12483

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HAUERKEN and

ST. CLAIR,

235 Montgomery Street,
San Francisco, California,

Proctors for Claimant and Appellant.

FRANK J. HENNESSY,

United States Attorney,

Northern District of California,
Post Office Building,
San Francsico, California,

Proctor for Libelant and Appellee.

In the District Court of the United States
For the District of Colorado

Civil 2110

THE UNITED STATES OF AMERICA,
Libelant,

vs.

33 BOTTLES, MORE OR LESS, OF AN ARTICLE LABELED IN PART "RI-CO TABLETS HOMEOPATHIC COMBINATION APP. 275 TABLETS"

LIBEL OF INFORMATION

To the Honorable Judge of the District Court for the District of Colorado:

Now comes the United States of America by Thomas J. Morrissey, United States Attorney for the District of Colorado, and shows to the Court:

1. That this libel is filed by the United States of America and prays seizure and condemnation of a certain article of drug, as hereinafter set forth, in accordance with the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 et seq.).

2. That the Alberty Food Products shipped in interstate commerce from Hollywood, California, to and into the City and County of Denver, in the State and District of Colorado, and within the jurisdiction of this Court, via Pacific Intermountain Express Company, on or about the 25th day of Novem-

ber, A.D. 1946, an article of drug consisting of 33 bottles, more or less, of an article labeled in part:

(bottle) "RI-CO Tablets
Homeopathic Combination
App. 275 Tablets
Each Tablet Contains:
Lithium Benzoicum, Ammonium Phos.
Lycopodium
Mfg. for and Packed by
Alberty Food Prod.
Hollywood, Calif.

Directions: Take tablets with a cupful of hot water. Take four times daily. Before meals and on going to bed."

3. That the aforesaid article is in the possession of Leeds Health House, Denver, Colorado, or elsewhere within the jurisdiction of this Court.

4. That the aforesaid article was misbranded in interstate commerce, within the meaning of the Federal Foods, Drug and Cosmetic Act, 21 U.S.C., Section 352(f) (1) in that its labeling fails to bear adequate directions for use since the only direction appearing in the labeling, namely, "Three tablets with a cupful of hot water. Take four times daily. Before meals and on going to bed," does not indicate the purpose or condition for which the article is intended and therefore is not adequate for its intelligent and effective use.

5. That the aforesaid article, misbranded in in-

terstate commerce, is subject to seizure and condemnation under 21 U.S.C., Section 334.

Wherefore, Libellant prays that process in due form of law according to the course of this Honorable Court in cases of admiralty jurisdiction issue against the aforesaid article; that all persons having any interest therein be cited to appear herein and answer the aforesaid premises; that this Court decree the condemnation of the aforesaid article and grant libellant the costs of this proceeding against the claimant of the aforesaid article; that the aforesaid article be disposed of as this Court may direct pursuant to the provisions of said Act; and that libelant may have such other and further relief as the case may require.

January, 1947.

UNITED STATES OF AMERICA,

By /s/ THOMAS J. MORRISSEY,
U. S. Attorney for the
District of Colorado.

Duly verified.

[Endorsed]: Filed January 8, 1947, U.S.D.C., District of Colorado.

[Endorsed]: Filed March 7, 1947, U.S.D.C., Northern District of California, Southern Division.

[Title of District Court and Cause.]

ORDER FOR WARRANT OF ARREST AND WRIT OF MONITION

On Application of Thomas J. Morrissey, United States Attorney for the District of Colorado, appearing for the libellant herein, It Is Ordered that a warrant of arrest and writ of monition issue herein, directed to the Marshal of this District, to seize and take into his custody the goods described in the libel herein.

It Is Further Ordered that the Marshal keep same in his custody until the further order of this Court, or the Judge hereof; that he serve a copy of the warrant of arrest and writ of monition upon the person in whose possession he may find said goods, and give notice of such seizure and libel to all persons having, or pretending to have, any right, title or interest in or to said goods, or having anything to say why said Court should not pronounce judgment against said goods, to be and appear before said Court in the courtroom of said Court, at the City and County of Denver, in the State of Colorado, on the 3rd day of March, A.D. 1947 (if it be a court day, or else on the next court day thereafter), at 10 o'clock in the forenoon of said day, then and there to interpose any claim for the same, and to make their allegations in that behalf; that said notice be given by publication in a newspaper of general circulation in said District

of Colorado, for not less than three weeks prior to said 3rd day of March, A.D. 1947.

Done in open Court this 8th day of January, A.D. 1947.

/s/ J. FOSTER SYMES,
District Judge.

[Endorsed]: Filed January 8, 1947, U.S.D.C., District of Colorado.

[Endorsed]: Filed March 7, 1947, U.S.D.C., Northern District of California, Southern Division.

[Title of District Court and Cause.]

WARRANT OF ARREST AND WRIT OF MONITION

The President of the United States of America:
To the Marshal of the District of Colorado, Greeting:

Whereas, a libel in rem has been filed in the District Court of the United States for the District of Colorado, against 33 bottles, more or less, of an article labeled in part:

(bottle) "RI-CO Tablets
Homeopathic Combination
App. 275 Tablets
Each Tablet Contains:
Lithium Benzoicum, Ammonium Phos.
Lycopodium

Mfg. for and Packed by
Alberty Food Prod.
Hollywood, Calif.

Directions: Three tablets with a cupful of hot water. Take four times daily. Before meals and on going to bed."

praying for the usual process of arrest and monition of said Court, and that all persons interested in said goods may be cited to appear and answer in the premises, and that said goods may, for the causes in said libel mentioned, be seized, condemned and confiscated.

You Are, Therefore, Commanded to attach said goods and retain same in your custody until the further order of this Court, or the Judge thereof, respecting the same; and to serve a copy of this writ and give notice to all persons having or pretending to have any right, title or interest in said goods, or having anything to say why the Court should not pronounce judgment against the same, according to the prayer of the libel, that they be and appear before said Court to be held at the City and County of Denver, in the State and District of Colorado, on the 3rd day of March, A.D. 1947 (if it be a Court day, or else on the next Court day thereafter), at 10 o'clock in the forenoon of said day, then and there to interpose any claim for the same, and to make their allegations in that behalf, and that notice be given by publication once a week in the Denver Democrat, a newspaper of general

circulation, published at Denver, Colorado, for three consecutive weeks prior to said March 3, 1947.

And what you shall have taken in the premises, and what you may do, do you then and there make return of, together with this writ.

Witness, the Honorable J. Foster Symes, Judge of the District Court of the United States for the District of Colorado and the seal of said Court at Denver, in said District, this 8th day of January, A.D. 1947.

/s/ G. WALTER BOWMAN,
Clerk of the U. S.
District Court,

[Seal] By /s/ WILLIAM GRAF,
Deputy Clerk.

Marshal's Return

United States of America,
District of Colorado—ss:

I hereby certify and return that I have duly executed the within writ at Denver, in said District, on the 10th day of January, A.D. 1947, by seizing and taking into my custody eight (8) bottles of an article labeled in part "RI-CO Tablets Homeopathic Combination App. 275 tablets," therein described, and now have the same in my possession, subject to the further order of this court.

I also certify and return that I have duly served this writ upon Leeds Health House, from which organization said goods were seized, by handing

to and leaving a true and correct copy thereof with Helen J. Olson, one of the co-partners, at Denver, in said District, on the 10th day of January, A.D. 1947.

And I further certify that due notice of attachment has been given by posting and is being published, as herein provided.

MAURICE T. SMITH,
U. S. Marshal,

By /s/ D. T. POTTER,
Deputy.

Receipt of copy attached.

[Endorsed]: Filed February 6, 1947, U.S.D.C., District of Colorado.

[Endorsed]: Filed March 7, 1947, U.S.D.C., Northern District of California, Southern Division.

[Title of District Court and Cause.]

STIPULATION FOR CHANGE OF VENUE

It Is Hereby Stipulated by and between the United States of America, by Thomas J. Morrissey, United States Attorney for the District of Colorado, and Alberty Food Products Co., a copartnership, consisting of Ada J. Alberty, Harry R. Alberty, Helen M. Alberty Hackworth, Kenneth J. Hackworth, Florence M. Alberty St. Clair and Margaret M. Alberty Quinn, shipper of the product mentioned

in the Libel of Information on file herein, by Hauerken Ames & St. Clair, its attorneys, that the above-entitled cause may be transferred to the District Court of the United States for the Northern District of California, Southern Division.

Dated this 26th day of February, 1947.

/s/ THOMAS J. MORRISSEY,
HAUERKEN, AMES &
ST. CLAIR,

By /s/ GEORGE H. HAUKERKEN,
Attorneys for Alberty Food Products Co., a co-partnership consisting of Ada J. Alberty, Harry R. Alberty, Helen M. Alberty Hackworth, Kenneth J. Hackworth, Florence M. Alberty St. Clair and Margaret M. Alberty Quinn.

[Endorsed]: Filed February 28, 1947, U.S.D.C., District of Colorado.

[Endorsed]: Filed March 7, 1947, U.S.D.C., Northern District of California, Southern Division.

[Title of District Court and Cause.]

ORDER FOR CHANGE OF VENUE

Upon reading and filing the stipulation for change of venue in the above-entitled proceeding, and good cause therefor appearing;

It Is Hereby Ordered that the above-entitled proceeding be, and the same is hereby, transferred to the District Court of the United States for the Northern District of California, Southern Division.

Dated this 28th day of February, 1947.

/s/ J. FOSTER SYMES,
Judge of the District Court.

A true copy—
Teste:

G. WALTER BOWMAN,
Clerk,

By /s/ WILLIAM GRAF,
Deputy Clerk.

[Endorsed]: Filed March 7, 1947.

[Title of District Court and Cause.]

MONITION

In obedience to a Warrant of Seizure to me directed, in the above-entitled cause, I have seized and taken into my possession the following-described property, to wit: 8 bottles of an article

label in part "RI-CO Tablets Homeopathic Combination App. 275 Tablets." For the causes set forth in the libel now pending in the U. S. District Court for the .... District of Colorado, at Denver. I hereby give notice to all persons claiming the said described property, or knowing or having anything to say why the same should not be condemned and forfeited, and the proceeds thereof distributed according to the prayer of the libel, that they be and appear before the said Court, to be held in and for the .... District of Colorado, at the United States Court Room, in the City of Denver on the 3rd day of March, 1947, at 10 o'clock on the forenoon of that day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf.

MAURICE T. SMITH,
U. S. Marshal,
.... Dist. of Colo.

By /s/ D. T. POTTER,
Deputy.

Marshal's Return

United States of America,
District of Colorado—ss.

I hereby certify that I caused the within notice to be published in The Denver Democrat, a weekly newspaper published in Denver, in said District, for three consecutive weeks prior to the 3rd day of March, A.D. 1947, and that a copy of this notice

has been posted on the premises wherein the goods seized in this cause are held by me, and also in the office of the Clerk of the United States District Court, at Denver, in said District, in accordance with a writ of monition and attachment in this cause issued out of the United States District Court at Denver, in said District, on the 8th day of January, A.D. 1947.

Affidavit of publisher is hereto attached and made a part hereof.

MAURICE T. SMITH,
U. S. Marshal,

By /s/ D. T. POTTER,
Deputy.

[Endorsed]: Filed March 17, 1947, U.S.D.C., District of Colorado.

[Endorsed]: Filed March 20, 1947, U.S.D.C., Northern District of California, Southern Division.

In the District Court of the United States for the Northern District of California, Southern Division

In Admiralty No. 24872-H

THE UNITED STATES OF AMERICA,
Libelant,

vs.

33 BOTTLES, MORE OR LESS, OF AN ARTICLE LABELED IN PART "RI-CO TABLETS HOMEOPATHIC COMBINATION APP. 275 TABLETS"

ALBERTY FOOD PRODUCTS CO., a Copartnership, Consisting of ADA J. ALBERTY, HARRY R. ALBERTY, HELEN M. ALBERTY HACKWORTH, KENNETH J. HACKWORTH, FLORENCE M. ALBERTY ST. CLAIR and MARGARET M. ALBERTY QUINN,
Claimant.

CLAIM OF OWNER

To the Honorable Judges of the District Court of the United States for the Northern District of California:

Now appears Alberty Food Products Co., a copartnership, consisting of Ada J. Alberty, Harry R. Alberty, Helen M. Alberty Hackworth, Kenneth J. Hackworth, Florence M. Alberty St. Clair and Margaret M. Alberty Quinn, intervening for the interest of itself as the owner of said 33 bottles,

more or less, of an article labeled in part "RI-CO Tablets Homeopathic Combination App. 275 Tablets" before this Honorable Court and makes claim to said products as the same are attached by the Marshal under process of this Court and at the instance of the United States of America, Libelant, and the said Claimant avers that it was, at the time of the filing of the libel herein, and still is, bona fide sole owner of said products and that no other person is the owner thereof;

Wherefore, it prays to defend accordingly.

ALBERTY FOOD
PRODUCTS CO.,

By /s/ ADA J. ALBERTY,
Copartner.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. CLAIR.

State of California,
County of Los Angeles—ss.

Ada J. Alberty, being duly sworn, deposes and says:

That she is a copartner in the firm of Alberty Food Products Co., a claimant herein, and as such is authorized to subscribe to oaths on behalf of said copartnership; that she has read the foregoing claim and knows the contents thereof and the same is true of her own knowledge, except as to the matters therein stated to be alleged upon information

and belief, and as to those matters she believes it to be true.

/s/ ADA J. ALBERTY.

Subscribed and sworn to before me this 24th day of March, 1947.

[Seal] /s/ AUGUST D. BARTOL,
Notary Public in and for the County of Los Angeles, State of California.

Receipt of copy admitted.
[Endorsed]: Filed April 7, 1947.

[Title of District Court and Cause.]

EXCEPTIONS TO LIBEL

To the Honorable Judges of the Southern Division of the United States District for the Northern District of California:

Alberty Food Products Company, a copartnership, consisting of Ada J. Alberty, Harry R. Alberty, Helen M. Alberty Hackworth, Kenneth J. Hackworth, Florence M. Alberty St. Clair and Margaret M. Alberty Quinn, excepts to the libel herein upon the following grounds:

I.

That the facts averred in the libel are insufficient to constitute a cause of action.

II.

That the facts averred in the libel are insufficient to constitute a cause of action in that it appears on

the face of the libel that the labeling of the article, the condemnation of which is sought by libelant, did bear adequate directions for usa as required by Section 352(f)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A., and that said article can accordingly not be deemed to be misbranded within the meaning of said Act, as alleged in the libel.

III.

That the facts averred in the libel are insufficient and indistinct in that it cannot be ascertained therefrom in what respect the labeling of the said article failed to bear adequate directions for use as required by said Act.

IV.

That the facts averred in the libel are insufficient to constitute a cause of action in that it appears on the face of the libel that the alleged misbranding of said article is but a failure to include on the label of said article information not required by said Act to be included thereon, either as directions for the use of said article, or otherwise, and that the alleged misbranding is accordingly no misbranding at all within the meaning of said Act.

Wherefore, claimant prays that the libel be dismissed with costs.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. SLAIR,
Attorneys for Claimant.

Receipt of copy attached.
[Endorsed]: Filed May 15, 1947.

[Title of District Court and Cause.]

ORDER

Claimant's exceptions having been briefed, argued and submitted for decision;

It Is Hereby Ordered that the exceptions be and the same are overruled.

Dated: September 30, 1947.

/s/ GEORGE B. HARRIS,
U. S. District Court.

[Endorsed]: Filed September 30, 1947.

[Title of District Court and Cause.]

ANSWER TO LIBEL

Alberty Food Products Co., a copartnership, consisting of Ada J. Alberty, Harry R. Alberty, Helen M. Alberty Hackworth, Kenneth J. Hackworth, Florence M. Alberty St. Clair and Margaret M. Alberty Quinn, respondents and claimants of 33 bottles, more or less, of an article labeled in part "RICO Tablets Homeopathic Combination App. 275 Tablets" for answer to the libel of the United States of America against said products, admit, deny and allege as follows:

I.

Deny the allegations contained in Article I.

II.

Admit the Allegations in Article II.

III.

Admit the allegations in Article III.

IV.

Deny the allegations in Article IV and V.

Wherefore, respondents and claimants pray that the libel herein be dismissed and that a decree be made herein directing the return of the products indicated in the caption hereof, and for costs of court and for such other relief as the case may require.

/s/ GEORGE H. HAUERKEN,

HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Respondents
and Claimants.

State of California,
County of Los Angeles—ss.

Ada J. Alberty, being duly sworn, deposes and says:

That affiant is a copartner in the firm of Alberty Food Products Co., claimant herein, and as such is authorized to subscribe to oaths on behalf of said copartnership; that she has read the foregoing Answer and knows the contents thereof and that the same is true of her own knowledge, except as to the matters therein stated on information and belief and as to those matters she believes it to be true.

/s/ ADA J. ALBERTY.

Subscribed and sworn to before me this 18th day of November, 1947.

[Seal] /s/ RUTH C. POOL,
Notary Public in and for the County of Los Angeles, State of California.

Receipt of copy attached.
[Endorsed]: Filed December 1, 1947.

[Title of District Court and Cause.]

DEMAND OF CLAIMANTS AND RESPONDENTS FOR TRIAL BY JURY

To the Honorable Judges of the Southern Division of the United States District Court, for the Northern District of California, and to the Clerk of said Court, and to the United States of America, and to Frank J. Hennessey, United States Attorney:

You are hereby notified that the Claimants and Respondents herein do hereby demand that all issues of fact joined in the above-entitled case shall be tried by a jury.

Dated: November 14, 1947.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Claimants
and Respondents.

Receipt of copy attached.
[Endorsed]: Filed December 1, 1947.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The United States now moves the Court for a summary judgment of condemnation on the grounds:

(1) There are no facts in dispute.

(2) The only legal issue has been decided in favor of the United States by this Court in its order of September 30, 1947, overruling Claimant's exceptions to the libel. Under this ruling, a drug is misbranded if its labeling fails to state the purpose or condition for which it is intended.

Attached to our brief in support of this motion are a number of affidavits. The affidavit of McKay McKinnon, Chief of the San Francisco Station, U. S. Food and Drug Administration, appends the complete labeling and the advertising of Ri-co Tablets. This affidavit shows that the labeling does not state the purpose or condition for which the drug is intended.

The other affidavits, of physicians, indicate the therapeutic worthlessness of Ri-co Tablets and support the Government's contention that after entry of a decree of condemnation, this Court in its discretion should order the tablets destroyed rather

than afford the Claimant an opportunity to relabel them.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

/s/ EDGAR R. BONSALL,
Assistant U. S. Attorney.

Receipt of copy attached.

[Endorsed]: Filed October 15, 1948.

United States District Court for the Northern District of California, Southern Division

ORDERED MOTION FOR SUMMARY JUDGMENT SUBMITTED

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 10th day of November, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Lloyd L. Black,
District Judge.

[Title of Cause.]

Case came on for hearing of motion for summary judgment, also for pre-trial conference. Edgar R. Bonsall, Esq., Asst. U. S. Atty., for libelant. Arthur A. Dickerman, Esq., Attorney for Food & Drug

Administration. George H. Hauerken, Esq., present as attorney for claimant, Alberty Foods Products Company, a copartnership.

Mr. Bonsall made a motion that Arthur A. Dickerman, Esq., be admitted to practice as an attorney of this Court for this case only, which motion was ordered granted.

After hearing Mr. Dickerman, Mr. Bonsall and Mr. Hauerken, Ordered that this case stand submitted to the Court for consideration and decision.

Further ordered that this case be continued to November 16, 1949, at 9:30 a.m. for decision.

MOTION FOR SUMMARY JUDGMENT ORDERED GRANTED; CLAIMANT'S APPLICATION FOR LEAVE TO SALVAGE SEIZED TABLETS FOR RELABELING ORDER DENIED

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 16th day of November, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Lloyd L. Black,
District Judge.

[Title of Cause.]

Case having been heretofore submitted, and due consideration thereon had, Ordered that the motion

for summary judgment be granted. Further ordered that claimant's application for leave to salvage seized tablets for relabeling be denied.

[Title of District Court and Cause.]

FINDINGS OF FACT CONCLUSIONS OF LAW

Findings of Fact

(1) On or about November 25, 1946, Alberty Food Products caused to be transported from Hollywood, California, to Denver, Colorado, 33 bottles, more or less, of a drug labeled in part "Ri-co Tablets."

(2) Said shipment was held in the possession of Leeds Health House, Denver, Colorado.

(3) In January of 1947, the United States filed a Libel of Information in the U. S. District Court for the District of Colorado, alleging that said drug was misbranded and praying seizure and condemnation of said shipment. Pursuant to said Libel and process issued thereunder, the United States Marshal for the District of Colorado seized the Ri-co Tablets proceeded against.

(4) Alberty Food Products Co., a copartnership, intervened as claimant in this proceeding and effected a removal of the action to the U. S. District Court for the Northern District of California.

(5) Said Ri-co Tablets are a drug within the meaning of 21 U.S.C. 321(g)(2) since they were intended for use in the treatment, mitigation, and cure of arthritis and rheumatism.

(6) The label affixed to each bottle of said Ri-co Tablets reads as follows:

[Front Panel]

Ri-co
Tablets
Homeopathic
Combination
App. 275 Tablets
Each Tablet Contains:
Lithium Benzoicum
Ammonium Phos.
Lycopodium
Mfg. for and Packed by
Alberty Food Prod.
Hollywood, Calif.

[Side Panel]

Directions:

Three tablets with a cupful of hot water. Take four times daily. Before meals and on going to bed.

[Side Panel]

Directions:

Three tablets with a cupful of hot water. Take four times daily. Before meals and on going to bed.

(7) The labeling of said Ri-co Tablets does not mention any disease condition.

(8) The labeling of said Ri-co Tablets fails to bear adequate directions for use in that it fails to declare the diseases or conditions of the body for which claimant offered the drug to the public, and for which claimant intended the drug to be used.

(9) The United States has filed a motion for Summary Judgment, supported by affidavits.

(10) Claimant does not seriously contend that the Ri-co Tablets are not misbranded as they are presently labeled, and proposes to consent to a decree of condemnation provided claimant is permitted to relabel said drug so as to conform with language in a Federal Trade Commission Order.

(11) There is no genuine issue as to any material fact that remains unresolved with respect to the question whether the Ri-co Tablets under seizure, as presently labeled, are misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act.

(12) The claimant, Alberty Food Products Co., and especially one of its partners, Ada J. Alberty, have been persistent violators of the Federal Food, Drug, and Cosmetic Act for many years.

(13) The Federal Trade Commission Order in question was based upon a Stipulation of Facts. The pertinent portion of the Order, as cited by the claimant, reads as follows:

"It is ordered . . . to forthwith cease and desist from 1. Disseminating or causing to be disseminated any advertisement by means of the United States mails, or by any means in commerce, as 'commerce' is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication:

(a) That the preparation 'Ri-co Tablets' constitutes an adequate or competent treatment for arthritis, rheumatism, gout or 'rheumatic gout'; or that said preparation will eliminate uric acid from the system; provided, however, that nothing herein shall be construed as prohibiting the representation that according to the principles of the homeopathic school of medicine the preparation is of value in ameliorating the symptoms of muscular or ligamentous pain and stiffness due to arthritis or rheumatism, except when such symptoms are accompanied by a febrile condition."

(14) The Federal Trade Commission Order does not hold that Ri-co Tablets are of value in ameliorating the symptoms of muscular or ligamentous pain and stiffness due to arthritis and rheumatism, etc. Said Order merely indicates that the Federal Trade Commission was not preventing Alberty Food Products Co., et al. from representing that Ri-co Tablets are of value for such purposes according to the principles of the homeopathic school of medicine.

(15) It is not necessary for this Court to determine whether Ri-co Tablets are worthless. The Government has submitted affidavits from prominent medical authorities, including homeopathic doctors, all to the effect that Ri-co Tablets are worthless. Claimant has made no showing that Ri-co Tablets have any efficacy or value. There is no showing of any loss to humanity or posterity if the Ri-co Tablets under seizure are destroyed.

Conclusions of Law

(1) The Ri-co Tablets here involved were shipped in interstate commerce from Hollywood, California, to Denver, Colorado.

(2) Said Ri-co Tablets were seized by the United States Marshal for the District of Colorado within the jurisdiction of the U. S. District Court for that District, pursuant to 21 U.S.C. 334(a). The jurisdiction of the U. S. District Court for the Northern District of California derives from an Order of the U. S. District Court for the District of Colorado removing the instant cause to this District on application of the claimant, pursuant to 21 U.S.C. 334(a).

(3) Said Ri-co Tablets are a drug under the Federal Food, Drug and Cosmetic Act within the meaning of 21 U.S.C. 321(g)(2).

(4) A drug is misbranded under 21 U.S.C. 352(f)(1) unless its labeling bears "adequate directions for use."

(5) The labeling of a drug does not bear adequate directions for use unless, among other things, it states the diseases or conditions of the body for which the drug is offered to the public.

(6) In seizure actions pursuant to 21 U.S.C. 334(a) and (b), the Admiralty Rules are applicable until seizure of the allegedly offending article is accomplished. Thereafter, the Civil Rules apply.

(7) Under amended Civil Rule 56(c), a summary judgment should be rendered forthwith on motion if it is shown from the pleadings and affidavits on file that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(8) The proviso in 21 U.S.C. 334(b) "that on demand of either party any issue of fact joined in any such case shall be tried by jury" does not entitle the claimant in a seizure action to a jury trial where there is no genuine issue as to any material fact, and where consequently there is no triable issue of fact.

(9) The aforesaid Ri-co Tablets under seizure here were misbranded within the meaning of 21 U.S.C. 352 (f)(1) when introduced into and while in interstate commerce in that the labeling of said drug fails to state the diseases or conditions of the body for which the drug was offered to the public by the claimant.

(10) Said Ri-co Tablets are subject to condemnation pursuant to 21 U.S.C. 334(a), and libelant

is entitled to a summary judgment ordering such condemnation.

(11) Whether a claimant should be afforded the privilege of relabeling or otherwise salvaging a condemned article is a matter which is left to the discretion of the District Court by 21 U.S.C. 334(d).

(12) A Cease and Desist Order issued by the Federal Trade Commission regarding representations made for a drug is not res judicata with respect to similar representations proposed for the relabeling of a drug which has been condemned as misbranded in violation of the Federal Food, Drug, and Cosmetic Act.

(13) The power of the District Court to condemn misbranded articles under the Federal Food, Drug, and Cosmetic Act is not impaired, diminished, or in any wise affected by the possibility that such misbranding may also be the subject of a cease and desist order of the Federal Trade Commission or even by the fact, if it be a fact, that such an order has actually issued.

(14) The District Court has discretion to permit relabeling of a condemned article, but, for the Court to allow a claimant who has violated the law to relabel, the claimant should make an affirmative showing that appeals to the judgment and conscience of the Court.

(15) Claimant is not entitled to relabel the aforesaid Ri-co Tablets, which should instead be destroyed.

(16) Libelant is entitled to its costs herein, pursuant to 21 U.S.C. 334(e).

Dated: November 29, 1949.

/s/ LLOYD S. BLACK,
U. S. District Judge.

Requested by:

EDGAR R. BONSALL,
Asst. U. S. Atty.,
Atty for Libelant.

Receipt of copy attached.

Lodged November 23, 1949.

[Endorsed]: Filed November 29, 1949.

In the District Court of the United States for the Northern District of California, Southern Division

In Admiralty No. 24872-H

THE UNITED STATES OF AMERICA,
Libelant,

vs.

33 BOTTLES, MORE OR LESS, OF AN ARTICLE LABELED IN PART "RI-CO TABLETS HOMEOPATHIC COMBINATION APP. 275 TABLETS"

and

ALBERTY FOOD PRODUCTS CO., Etc.,
Claimant.

DECREE OF CONDEMNATION AND DESTRUCTION

Pursuant to the Findings of Fact and Conclusions of Law entered this day by the Court in this proceeding in accordance with the oral opinion of this Court handed down on November 16, 1949, it is

Ordered, Adjudged, and Decreed that the aforesaid article of drug under seizure, namely, Ri-co Tablets, is misbranded in violation of 21 U.S.C. 352 (f)(1), and is hereby condemned and ordered destroyed by the United States Marshal pursuant to 21 U.S.C. 334(a) and (d), and that said Marshal shall make his return into Court in this matter; and it is further

Ordered, Adjudged, and Decreed, pursuant to 21

U.S.C. 334(e), that the United States of America shall recover from the claimant, Alberty Food Products Co., court costs, and fees, and storage and other proper expenses.

Dated: November 23, 1949.

/s/ LLOYD S. BLACK,
U. S. District Judge.

Receipt of copy attached.

Lodged November 23, 1949.

[Endorsed]: Filed and entered Nov. 29, 1949.

[Title of District Court and Cause.]

PETITION FOR APPEAL

Alberty Food Products Co., a copartnership consisting of Ada J. Alberty, Harry R. Alberty, Helen M. Alberty Hackworth, Kenneth J. Hackworth, Florence M. Alberty St. Clair and Margaret M. Alberty Quinn, claimant herein, being aggrieved by the decree of condemnation and destruction entered herein on the 29th day of November, 1949, by the above-entitled Court, claims an appeal from said decree and prays that said appeal may be allowed.

Dated: This 15th day of December, 1949.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Claimant.

[Endorsed]: Filed December 16, 1949.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Pursuant to the petition for appeal of Alberty Food Products Co., a copartnership consisting of Ada J. Alberty, Harry R. Alberty, Helen M. Alberty Hackworth, Kenneth J. Hackworth, Florence M. Alberty St. Clair and Margaret M. Alberty Quinn, claimant herein, dated December 15, 1949, and presented this date to the Court:

It Is Hereby Ordered that the appeal of said claimant from the decree of condemnation and destruction entered herein on the 29th day of November, 1949, be allowed as prayed for and that said claimant file a cost bond on appeal of a corporate surety in the amount of Two Hundred Fifty ($250.00) Dollars and that, upon the filing of said bond, all proceedings under said decree be stayed.

Dated: This 16th day of December, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed December 16, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice is hereby given that Alberty Food Products Co., a copartnership consisting of Ada J. Al-

berty, Harry R. Alberty, Helen M. Alberty Hackworth, Kenneth J. Hackworth, Florence M. Alberty St. Clair and Margaret M. Alberty Quinn, claimants herein, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final decree of condemnation and destruction entered in the above-entitled proceeding on the 29th day of November, 1949, and from each and every part thereof.

/s/ GEORGE H. HAUERKEN,

HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Claimant.

Receipt of service attached.
[Endorsed]: Filed December 16, 1949.

WRIT OF DESTRUCTION

No. 24872-H

[Title of District Court.]

The President of the United States of America

To the Marshal of the District of Colorado, Greeting:

Whereas, an information was filed in the United States District Court for the District of Colorado on the 7th day of March, A.D. 1947, by Frank J. Morrissey, United States Attorney, on behalf of the United States of America, against 33 Bottles, more or less, of an Article labeled in Part: "Ri-co

Tablets Homeopathic Combination App. 275 Tablets," and praying that the same may be condemned as forfeited to the use of the said United States. And whereas the said goods, wares, and merchandise have been attached by the process issued out of the said District Court of Colorado in pursuance of the said information and are now in custody by virtue thereof; and such proceedings have been thereupon had that by the final sentence and decree of the District Court of California in this cause made and pronounced, on the 29th day of November, A.D. 1949, the said goods, wares, and merchandise were ordered to be destroyed by you, the said Marshal for the District of Colorado, according to law. And that you have this Writ at a United States District Court, to be held for the Northern District of California at the City of San Francisco, on the 20th day of December, A.D. 1949.

Therefore, you, the said Marshal for the District of Colorado, are hereby commanded to cause the said goods, wares, and merchandise so ordered to be destroyed, to be destroyed in manner and form, upon the notice, and at the time and place by law and order of Court required. And that you have also then and there this Writ.

Witness, the Honorable Lloyd L. Black, United States Judge at San Francisco, this 29th day of November, A.D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ E. H. NORMAN,
Deputy Clerk.

In obedience to the above precept, I have destroyed the said goods, wares, and merchandise as I am above commanded.

Dated this 14th day of December, 1949.

MAURICE T. SMITH,
U. S. Marshal,

By /s/ OSCAR A. CRIST,
Deputy Marshal.

[Endorsed]: Filed December 19, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the appellant herein may have to and including February 24, 1950, to file the record on appeal in the United States Court of Appeals for the Ninth Circuit.

Dated: January 24, 1950.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

Approved 1/24/50.

/s/ EDGAR R. BONSALL,
Asst. U. S. Atty.

[Endorsed]: Filed January 24, 1950.

CITATION ON APPEAL

United States of America—ss.

The President of the United States of America
To the United States of America, Greeting:

You Are Hereby Cited and Admonished to be and appear at a United States Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Alberty Food Products Co., a co-partnership consisting of Ada J. Alberty, Harry R. Alberty, Helen M. Alberty Hackworth, Kenneth J. Hackworth, Florence M. Alberty St. Clair and Margaret M. Alberty Quinn, No. 24872, claimant and appellant, and you are appellees, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis E. Goodman, United States District Judge for the Northern District of California, Southern Division, this 9th day of February, A.D. 1950.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

Service of copy acknowledged.

[Endorsed]: Filed February 9, 1950.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS AND STATEMENT OF POINTS RELIED UPON ON APPEAL

Appellant hereby assigns error in the proceedings, orders and decisions of the District Court in the above-entitled cause and hereby states the points upon which it intends to rely on appeal as follows:

(1) The court erred in holding that Ri-Co Tablets were misbranded and in ordering their condemnation and destruction.

(2) The court erred in finding and holding that the labeling of Ri-Co Tablets fails to bear adequate directions for use in that it does not declare the diseases or conditions of the body for which Ri-Co Tablets are offered to the public by appellant and for which appellant intends them to be used.

(3) The court erred in finding that appellant "does not seriously contend that the Ri-Co Tablets are not misbranded as they are presently labeled."

(4) The court erred in deciding this case under rules applicable to civil cases instead of deciding it under rules applicable to admiralty cases, and particularly in holding that the summary judgment procedure provided by rule 56 of the Federal Rules of Civil Procedure is applicable to a proceeding for the condemnation of a drug and in applying that procedure to this condemnation proceeding.

(5) The court erred in finding and holding that

no genuine issue as to any material fact remains unresolved with respect to the question of whether Ri-Co Tablets were misbranded; the court accordingly erred in granting the motion for summary judgment.

/s/ GEORGE H. HAUERKEN,

HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Claimant,
Alberty Food Products Co.

Receipt of copy attached.

[Endorsed]: Filed February 9, 1950.

[Title of District Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL AND DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS, AND EVIDENCE TO BE CONTAINED IN RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Claimant and appellant herein, having appealed to the United States Court of Appeals for the Ninth Circuit from the decree of condemnation and destruction made and entered herein by the above-entitled Court on November 29, 1949, hereby designates the following portions of the record, proceedings and evidence as the portions of the record, proceedings and evidence to be contained in the

record on appeal and hereby request you to prepare and certify apostles on appeal, to be filed in said Court of Appeals in due course, and to include the following in said apostles:

All of the original papers on file herein, including this praecipe and designation, and particularly all of the papers required to be included by Rule 75 of the Federal Rules of Civil Procedure, and by Rule 37 of the Rules of the United States Court of Appeals for the Ninth Circuit.

/s/ GEORGE H. HAUERKEN,

HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Claimant,
Alberty Food Products Co.

Receipt of copy attached.

[Endorsed]: Filed February 9, 1950.

In the Southern Division of the United States District Court for the Northern District of California

No. 24,872-H in Admiralty

THE UNITED STATES OF AMERICA,
Libelant,

vs.

33 BOTTLES, MORE OR LESS, OF AN ARTICLE LABELED IN PART "RI-CO TABLETS HOMEOPATHIC COMBINATION APP. 275 TABLETS," ALBERTY FOOD PRODUCTS CO., ETC.,
Claimant.

Before: Hon. Lloyd L. Black,
Judge.

REPORTER'S TRANSCRIPT

Wednesday, November 16, 1949

Appearances:

For Libelant:

ARTHUR A. DICKERMAN, ESQ.,

EDGAR R. BONSALL, ESQ.,

For Claimant:

GEORGE H. HAUERKEN, ESQ.

DECISION ON MOTION FOR SUMMARY JUDGMENT

The Clerk: United States v. 33 Bottles of Ri-Co Tablets. Motion for Summary Judgment, for decision.

Mr. Hauerken: Ready.

Mr. Dickerman: Your Honor, may I request I be heard briefly on a new development that came to my attention this morning. It involves another case, or another libel with the Food and Drug Law wherein the District Court of the Northern District of Illinois granted motion for summary judgment. I have a mimeographed copy of this opinion which I received this morning. I gave a copy to counsel.

The Court: You may hand it to me.

Mr. Dickerman: I wish to call the attention of the Court, the question apparently was not raised as to whether the admiralty or civil rules applied.

The Court: In the matter of the United States of America v. 33 Bottles, More or Less, of an Article Labeled in Part "Ri-Co Tablets Homeopathic Combination App. 275 Tablets," Alberty Food Products Co., etc., Claimant, the Government is asking for summary judgment. The claimant suggested in the first instance that summary judgment is not applicable on the ground that under the statutes the proceeding is to be considered as one in admiralty, and that therefore the civil rules of Federal Procedure providing for summary judgment do not authorize action by the Court as requested by the Government.

I say that the claimant has suggested that summary judgment is not applicable. Actually, counsel for claimant has further suggested to the Court that condemnation is appropriate and should be ordered, but that the Court should further provide that the claimant should be permitted to relabel the bottles in accordance with the practice counsel says the claimant is now following pursuant to a decision by the Federal Trade Commission. In effect, then, I take it the question of whether or not this is a proceeding in admiralty is, in so far as counsel is able to make it, somewhat academic. It might almost be said that it is the law of this particular case that condemnation on the record should enter, and that the issue is whether or not relabeling should be permitted.

I have looked at the authorities: the decision of the Supreme Court in 226 U.S., beginning at page 172; 33 Supreme Court, beginning at page 50; and 57 Law Edition, page 175, has been cited to the Court by the Government as establishing that this proceeding is civil and is not one in admiralty. That Supreme Court decision in substance held that the law then before the Supreme Court likened the proceedings to one admiralty in connection with the seizure of the property by process in rem, and that decision of the United States Supreme Court in effect was that after the seizure the matter became a proceeding in law and was governed by the statutes and rules apart from admiralty.

Counsel for the plaintiff has pointed out that that decision was before the enactment of the pres-

ent statute. After reading the Supreme Court decision, it seems to me that the principal therein enunciated, properly applied to the present statute, strongly indicates that it is to be deemed a civil rather than an admiralty matter after the seizure. It would therefore appear that summary judgment would be applicable.

My view of the force and effect of that Supreme Court decision, which I think was about 1912, is in harmony with the view of the Circuit Court of Appeals for the Sixth Circuit, after the enactment of the present statute, which decision was rendered June 22, 1943, and is found in 136 Fed. Rep., 2nd Series, beginning at page 523. The Court of Appeals of the Sixth Circuit, in substance, held that the proceeding was not intended to be likened to one in admiralty beyond the seizure of the property by process in rem under the statutes.

Under the decisions cited to me, I am satisfied that the Federal Rules of Civil Procedure are effective and that a summary judgment, upon proper showing, can be entered.

There has just been handed to me District Court decision from the Northern District of Illinois, United States v. 17 Cases, More or Less, of Nue-Ovo, Research Laboratories, Inc. In this decision, dated October 11, 1949, the judge assumed that entry of a summary judgment was within his authority. It does not appear, however, that anyone objected to his exercising the authority providing the showing was sufficient. But independently

of this most recent decision, I am satisfied that the proceeding is, at this stage, not one in admiralty. The main contention of the claimant is that by virtue of the Federal Trade decision, the holding that its right to relabel these articles is established be on the doctrine of res adjudicata. Such is a most interesting contention. Counsel for claimant depends primarily upon the decision of the United States v. Willard Tablet Company, 141 Fed. (2d), beginning at page 141, being a decision by the Circuit Court of Appeals of the Seventh Circuit under date of March 7, 1944. That court undoubtedly does hold that a decision by the Federal Trade Commission is binding upon the court in an independent proceeding; and the court in that decision depended upon an earlier decision by the Circuit Court of Appeals for the Eighth Circuit in Lee v. Federal Trade Commission, 113 Fed. (2d) 583. However, the Circuit Court of Appeals for the Ninth Circuit, under date of February 24, 1942, in U. S. v. Research Laboratories, Inc., reversing a holding by myself at Tacoma, said the following:

"It is immaterial, if true, that the makers and advertisers of Nue-Ovo could have been proceeded against by the Federal Trade Commission under the Federal Trade Commission Act and could have been ordered to cease and desist from publishing and distributing the circular entitled 'What Is Arthritis?' The power of the District Court to condemn misbranded articles is not impaired, diminished, or in any wise affected by the possibility that such misbranding may also be the subject of

a cease and desist order or either by the fact, if it be a fact, that such an order has actually issued."

I am bound and controlled by the decision of this circuit, regardless of whether I agree or disagree with its correctness. I am only to be persuaded by the decisions of the Seventh Circuit or the Eighth Circuit if they appeal to my reason and are not at variance with the decisions of the Court of Appeals for the Ninth Circuit.

December 8, 1943, 139 Fed. Rep. (2d), page 197, in the Sekov Corporation v. United States, the Circuit Court of Appeals for the Fifth Circuit cited with approval the decision of 122 Fed. (2d) 42, U. S. v. Research Laboratories, of this Ninth Circuit, which I have just mentioned.

Mr. Hauerken: Your Honor, may I say a word?

The Court: It stated this:

"Appellant Sekov Corporation contends that the fact that it had been previously proceeded against by the Federal Trade Commission barred inquiry by the District Court into the questions presented by the Government's libel. There is no merit in this contention. The issues in that proceeding were not identical with those here presented. Moreover, the power and duty of the District Court to condemn the misbranded articles was not impaired or diminished by the former proceeding. United States v. Research Laboratories, 9 Cir., 126 Fed. (2d) 42, 45."

While the decision of the Eighth Circuit in 113 Fed. (2d) 583, which I previously mentioned, ap-

pealed to the Court of Appeals for the Seventh Circuit in the Willard Tablet Company case, such decision in 113 Fed. (2d) neither appealed to the Circuit Court of Appeals for the Fifth Circuit nor to the Circuit Court of Appeals for the Ninth Circuit.

Unquestionably I must hold that what the Federal Trade Commission did in an independent and different proceeding is not res adjudicata here. Actually, such would appear not to be res adjudicata for further reasons. In the first place, what the Trade Commission did apparently was done pursuant to stipulation. Other courts, in independent proceedings where the showing is different, are very reluctant to consider themselves barred by a commission's holding on a stipulation. Further than that, I do not find that the Commission held anything. I am advised that the cease and desist order of the Federal Trade Commission required this claimant to cease and desist from disseminating advertisements in the United States mails or by any means in commerce which represent "that the preparation 'Ri-Co Tablets' constitutes an adequate or competent treatment for arthritis, rheumatism, gout or rheumatic gout; or that said preparation will eliminate uric acid from the system; provided, however, that nothing herein shall be construed as prohibiting the representation that according to the principles of the homeopathic school of medicine the preparation is of value in ameliorating the symptoms of muscular or ligamentous pain and stiffness due to arthritis or rheumatism except when

such symptoms are accompanied by a gebrile condition."

It is apparent that the Federal Trade Commission did not hold that Ri-Co Tablets were of value to ameliorate the symptoms of muscular or ligamentous pain and stiffness due to arthritis or rheumatism. The most that the Federal Trade Commission said was that it was not preventing the claimant from contending that such was of benefit. That is a far cry from any adjudication that should be considered as res adjudicata.

But even if the Federal Trade Commission had done what counsel feels it did do, the Circuit Court of Appeals for the Ninth Circuit certainly told me that any holding of any Federal Trade Commission was of no avail in another and independent proceeding before the District Court. There is no showing in behalf of the claimant before me that the tablets have any efficiency or any value. All of the showing, so far as presented, is to the effect that they are worthless.

The application for summary judgment based upon the pleadings, however, is upon the ground that the labels did not give adequate directions as required by the statute. The label did state that the tablets were to be taken at certain intervals, without even a hint that the tablets were helpful for anything. The Government's contention is that the directions, to be adequate, must not only tell how often the alleged remedy is to be taken, but for what it is to be used. The decisions of the Circuit Court

of Appeals in this Circuit, both of the District Courts and of the Court of Appeals, are to the effect that as to remedies' directions, to be adequate they must not only say how often but for what.

It seems to me that such holdings which are binding upon me are in accord with reason and in harmony with the purpose of the Pure Food and Drug Act.

The condemnation asked will be ordered upon the ground that the directions printed did not comply with the statute; upon the ground that they were inadequate.

I am not holding that Ri-Co Tablets are worthless. That issue actually was not presented to me. The Court has the authority, in its discretion, to permit the claimant to relabel these tablets; but certainly for the Court to allow claimant which has violated the law to relabel tablets, the claimant should make an affirmative showing that appeals to the judgment or conscience or both of the Court. No showing whatsoever has been made. It is conceded that the claimant has been held repeatedly to have violated the law, either as to these tablets or other preparations. The claimant has not attempted to persuade me that the tablets are good and that there would be any loss to humanity or posterity if I allow condemnation to be effected. Claimant has relied solely upon the Willard Tablet case, which is a holding of the Northern Circuit and not binding on me, and which is contrary to a holding of this Circuit which does control.

I know no good reason that I should require the Government to turn over these tablets for relabeling. Judgment and order will be presented in conformity with my announcement.

Counsel, there was something you wished to say?

Mr. Hauerken: I presume it is too late inasmuch as your Honor has announced judgment. I do feel your Honor has erroneously construed the Research Laboratories Company case. I do not know whether your Honor wants me to be heard on this or not, but I would like to show my views on it.

The Court: Well, counsel, I told you I am quite familiar with that case. I am speaking now informally. It is not a part of my decision. I thought at the time I rendered decision in Tacoma that I was right. It might not be very hard for you to convince me that the Circuit Court was mistaken, but the Circuit Court reversed me and I am bound by what it said and certainly it said what I have quoted from it, because I read it verbatim. I have no quarrel with that portion of the Circuit Court's holding. I think, as I pointed out before to you, I have held the libel was so crudely and inexpertly drawn that it had no right to be considered by the Court and I dismissed it. The Circuit Court of Appeals in reversing me admitted the following:

"The libel is crudely and inexpertly drawn. It does not state directly and positively, as a competently drawn liber would have stated, that the 143 packages of Nue-Ovo were misbranded when introduced into or while in interstate commerce."

But the Circuit Court of Appeals held that the crudeness and lack of expertness in the drawing of the libel, while not to be commended, was not as fatal as I thought it was. But I am satisfied now, upon upon the problem you present I have disagreed directly with you and disagreed directly with the doctrine of the Willard case on which you relied.

Mr. Hauerken: The point I make in that, that violation, if any, was a violation of the Federal Trade Commission Act and therefore there could be no prosecution under the Food and Drug Act, as I recall that case. The question was whether or not the pamphlets had accompanied the article in interstate commerce. Wasn't that the case where it was held common origin, common destination, and approximately a shipment at the same time constituted a libel? I think that is the case I have in mind.

The Court: Well, whatever was there at issue, the Circuit Court of Appeals announced the doctrine for this Circuit that answered your argument far better than any counsel could hope to answer it, and the Circuit Court of Appeals for the Fifth Circuit seemed to think that that doctrine was appropriate because, as I say, it disregarded the decision in 113 Fed. (2d) the court in the Willard case relied on.

Mr. Hauerken: My concept of that case is that a person could violate both acts, and I think that is what those cases hold, that by the one action you would be in violation of both acts.

The Court: I have no question of that, counsel, but both courts say in an independent proceeding

on different showings the court is not bound by what the Federal Trade Commission may do, and that is particularly true when what the Federal Trade Commission did, in so far as it did anything, was on stipulation; and most particularly true when the Federal Trade Commission didn't do anything, but just merely negatively said that its order was not to be construed as stopping you from doing something.

Mr. Hauerken: I merely wanted to present that point, your Honor. I have no desire to draw the matter out.

The Court: The Court will say this: It has been very interested in the presentation by counsel on both sides. Counsel on each side have been very helpful to the Court and have ably presented their various matters. I am sure I understood the presentation of counsel for claimant. Under the law as I see it, and the facts as presented, I am holding against him. He may be right, but I do not think so. I thank counsel on both sides for your assistance to the Court.

That is all.

Certificate of Reporter

I, K. J. Peck Official Reporter, certify that the foregoing page is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ K. J. PECK.

[Endorsed]: Filed January 3, 1950.

[The following exhibits were attached to Brief in Support of Motion for Summary Judgment, filed Oct. 15, 1948.]

EXHIBIT NO. 2

In the District Court of the United States for the Northern District of California, Northern Division

In Admiralty No. 24872-H

THE UNITED STATES OF AMERICA,
Libelant,

vs.

33 BOTTLES, MORE OR LESS, OF AN ARTICLE LABELED IN PART "RI-CO TABLETS HOMEOPATHIC COMBINATION APP. 275 TABLETS"

ALBERTY FOOD PRODUCTS CO., a Copartnership, Consisting of ADA J. ALBERTY, HARRY R. ALBERTY, HELEN M. ALBERTY HACKWORTH, KENNETH J. HACKWORTH, FLORENCE N. ALBERTY ST. CLAIR, and MARGARET M. ALBERTY QUINN,
Claimant.

Affidavit of McKay McKinnon, Jr.

United States of America,
Northern District of California—ss.

State of California
County of San Francisco

Before me, Andrew J. Brown an employee of the

Federal Security Agency, Food and Drug Administration, designated by the Federal Security Administrator, under authority of the act of January 31, 1925, c. 124, sec. 1, 43 Stat. 803, and Reorganization Plan No. IV, Secs. 12-15, effective June 30, 1940, to administer or take oaths, affirmations, and affidavits, personally appeared Mr. McKay McKinnon, Jr. in the County and State aforesaid, who, being first duly sworn, deposes and says:

(1) I am Chief of the San Francisco Station of the Food and Drug Administration, Federal Security Agency and am in charge of the enforcement activities of the Station.

(2) The official records of the San Francisco Station contain an extensive file on the case of U. S. vs. 33 Bottles "*** Ri-co Tablets Homeopathic Combination App. 275 Tablets," Admiralty No. 24872-H, now pending in the Northern District of California. There are stored under official seal at the San Francisco Station, official samples that were taken from the article under seizure.

(3) From the official records and official samples filed and stored at the San Francisco Station I have had copies made of the following items which are appended and identified as indicated:

Exhibit A—Photostats of complete labeling of a specimen of the Ri-co Tablets under seizure in this case.

Exhibit B—Advertisement for Ri-co Tablets which appeared in the Rocky Mountain News, Denver, Colorado, on October 1, 1946 on page 19.

Exhibit C—Advertisement for Ri-co Tablets which appeared in the San Francisco Chronicle on June 7, 1948.

(4) I have compared the photostats referred to with the originals in my possession and I certify that they are exact copies.

/s/ McKAY McKINNON, JR.
Signature.

Subscribed and sworn to before me at San Francisco, California, this 28th day of September, 1948.

/s/ ANDREW J. BROWN,
Employee of the Federal Security Agency, designated under Act of January 31, 1925, and Reorganization Plan IV effective June 30, 1940.

RI-CO
Tablets
HOMEOPATHIC
COMBINATION

Each Tablet Cont
Lithium Benzoic
Ammonium Phc
Lycopodium

Mfg. For and Pack
LIBERTY FOOD
Hollywood, C

DIRECTIONS:

Three tablets with a cupful of hot water. Take four times daily. Before meals and on going to bed.

Obituaries

Mrs. Ilma Clark Howard

Funeral services for Mrs. Ilma Clark Howard, wife of Mayor B. T. Howard of Aurora, will be held at 11 a. m., tomorrow, in St. Thomas' Episcopal Church, 2201 Dexter st. Burial will be in Fairmount Cemetery.

Mrs. Howard died yesterday at her home in Aurora. She was 62.

Born in Paducah, Ky., on Dec. 16, 1884, she spent most of her early life in Memphis, Tenn. She was married to Mr. Howard in

Mrs. Ilma Clark Howard

San Antonio in 1917. In 1925, they came to Denver, where they lived until moving to Aurora three years ago.

Mrs. Howard was an active member of the Garden Club while in Denver. She was a member of St. Thomas' Church and a former president of its altar guild. An active member of the Jane Jefferson Club, she was on the reception committee when Mrs. Truman visited Denver.

Mrs. Howard also was a member of the Aurora Woman's Club.

She is survived by her husband and three sisters, Mrs. Carrie May Wynne of Memphis, Mrs. Dottie Root of Urbana, Ill., and Mrs. Zetta King of Los Angeles.

Mrs. Cora B. McNerny

Funeral services for Mrs. Cora B. McNerny, who died at her home, 1429 S. University blvd, on Saturday, were held yesterday at the Moore Mortuary. Interment was at Fairmount Cemetery.

Born in Iowa in 1874, she came to Denver in 1886 with her parents and eight years later was married to the late William McNerny, for many years operator of the Hills Sign Co. Mrs. McNerny was one of the earliest members of the Wednesday Literary Club.

Surviving are two sons, Clyde F. and William M. McNerny of Denver, three nieces and one grandchild.

Harry H. Tangeman

Harry H. Tangeman, Denver attorney, died yesterday in his home, 730 Gilpin st., after a brief illness.

He had been an attorney here since 1900 and was a member of Phi Beta Kappa and Sigma Kappa at Kansas University. He was active in the Twenty-third Avenue Presbyterian Church.

Surviving are three sisters:

Edward C. Austin

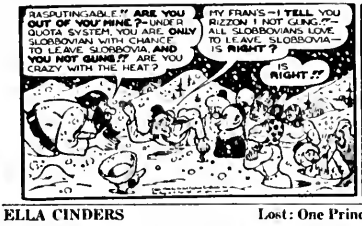
Funeral services for Lt. Col. Edward C. Austin, 3030 E. 17th st., retired officer of the regular army, will be held at the Boetto Mortuary Thursday at 3 p. m. Burial will be at Fairmount Cemetery.

Colonel Austin died Sunday afternoon at Huntington Memorial Hospital in Pasadena, Calif. He

[illegible]ecan of World War I, Colonel Austin was married in 1918 to Agnes Byles in Denver. He was a member of the Colorado National Guard, the American Legion, Veterans of Foreign Wars, the Denver Athletic club, had been a Mason [illegible] and a past patron of the Eastern Star.

He is survived by his wife,

LIL ABNER — Ladies First — By Al Capp



ELLA CINDERS — Lost: One Princess — By Charles Plumb and Fred Fox

21 Nazi Leaders Guilty of War; Death Thought Sure for at Least 18

(Continued From Page 3)

connected with atrocities on the Eastern front—Russia, Poland and Czechoslovakia—would escape the death penalty.

It appeared that those whose activities were confined almost solely to business, propaganda and diplomacy—Hjalmar Schacht, Hans Fritzsche and Franz von Papen—might escape with prison sentences.

Later, as they heard their names linked to some of the world's greatest crimes, their interest gave way to evident fatalism and boredom. For the most part they sat, a sunken-cheeked, hollow-eyed, disheveled group of weary, hopeless old men paying but little attention to the verdict.

Mass Guilt of 500,000 Pronounced

In addition to the 21 defendants in the dock and the missing Bormann, who is presumed to have been killed by a Russian shell in Berlin, the court pronounced mass guilt against an estimated 500,000 members of the three guilty Nazi organizations.

No sentences were imposed against the guilty members. These will be handed down by the Allied Control Council in Berlin or by special courts or commissions yet to be created.

The Tribunal declared that every one of the members of the three organizations were guilty, except "well leaders" and "block leaders" of the Nazi Party leadership corps, and that they may "subsequently be convicted of the crime of membership and punished for that crime by death."

Elite Guard Castigated

The verdict castigated the SS Elite Guard with these words:

"The SS was utilized for purposes which were criminal under the charter, involving persecution and extermination of Jews, brutalities and killings in concentration camps, excesses in administration of occupied territories, administration in the slave labor program and mistreatment and murder of prisoners of war. The defendant Kaltenbrunner was a member of the SS implicated in these activities."

The Tribunal warned, however, that at these must be no excesses in sentencing members of the organizations and that in no case must their sentences be greater than those inflicted under the de-Nazification laws.

Slaying of Slaves Denounced

Among the crimes charged to the Gestapo and SS were the slaying of all aged, insane and incurable slave workers and others "useless eaters"—who were put to death in special institutions.

"The victims included foreign laborers who no longer were able to work. . . . It has been estimated that at least 275,000 people were killed in this manner, in nursing homes, hospitals and asylums under the jurisdiction of the defendant Frick."

Estimates 6 Million Jews Slain

The tribunal's verdict quoted Fritz Sauckel, slave labor leader, as saying "From five million workers who arrived in Germany, not even 200,000 came voluntarily." In the prisoner's dock, Sauckel jerked erect and shook his head vigorously when this was read.

Chief Hanebuth Ordered Into Court

(Continued From Page 3)

when asked to explain his duties as chief of police. The transcript follows:

Q. Would you tell us briefly, Chief Hanebuth, what your duties are as chief of police?

A. I don't care to answer that, if it is going to incriminate me I refuse to answer.

Q. Well, do you think that question will incriminate you?

A. Sir?

Q. Do you mean that you think if you tell us what your duties are as chief of police, that would incriminate you?

A. Well, it might lead up to something.

Richard Akers Absent

He also was questioned concerning the death of Lester L. Akers, who died April 7 after a scuffle with a patrolman in the police booking room. When Hanebuth was questioned concerning the incident, according to the transcript, he replied:

"I could give you some light on that, but I'm not going to."

The questioning was conducted by District Attorney Burke and his assistant, S. T. Anderson.

Burke based his petition to the court on the ground that Hanebuth is not the sole determinant of what questions might tend to incriminate him.

Seven Firemen Get Promotions

Six firemen were raised to the rank of engineer ordered by Robert J. Kirschwing, manager of safety, and another was made a lieutenant in the department.

Ellsworth W. Crawford, 3064 Sheridan blvd., a fireman since 1932, received the lieutenant's appointment. Firemen who were made engineers included

William Belz, 4353 Cheyenne st.; Thomas Kevil, 2123 W. 42d ave.; Joseph Schwartz, 1200 E. Colfax ave.; Lawrence Lomer, 3215 W. 23d ave.; Robert E. Hanrahan, 4225 Umatilla st., and Edwin B. Ball, 2201 S. Humboldt st. The appointments are effective today.

Tonight at Midnight!

Competition closes tonight in Class L, Babies and Children, of The Chronicle's Amateur Snapshot Contest and the $10,000 Newspaper National Snapshot Awards. Starting tomorrow, the contest will be open to entries in Class B, Young People and Adults.

All you have to do to enter the contest—which offers cash prizes ranging up to $1,000 apiece—is to send your snapshots to the Snapshot Contest Editor, The Chronicle, Fifth and Mission street, San Francisco 19. Name, address, telephone number and the class in which the picture is entered should be printed on the back of each snapshot.

See complete contest rules plus announcement of the winner of this week's $10 prize; see next Sunday's 12-PAGE section.

Edith Wilson Candidate For Judge

Assistant District Attorney Edith Wilson announced yesterday in Municipal Court candidacy for election to the position of Judge Lewis Michaux, who is Superior Judge-at-large Tuesday's election.

Mrs. Wilson, who has been with the District Attorney's office for the past 20 years, is being backed for the post by several Bay Region women's clubs.

The attorney said he plans to campaign actively for the office.

Mrs. Wilson became a member of the District Attorney's staff in 1928 when, under pressure by Matthew Brady, then District Attorney, now Municipal Judge, Police was ousted prosecutor in the women's police court by Police Inspector Jessie Hoyne. Mrs. Wilson was at that time a member of the police force and was the first female prosecutor in the women's police court.

Mrs. Wilson is a graduate of the University of California and Hastings Law School.

She is married to attorney Orrick Wilson, former Municipal Judge, and is a member of the San Francisco Soroptimists.

Animal Crackers

By Warren Goodrich

Why do you waste straws on that guy?"

Atlantic-Straits Settlement Service

Sailing Dates Listed by President Lines

Sailing dates for the Atlantic-Straits Settlement service of President Lines have been announced by Dollar Steamship Lines, agents for the line.

The first sailing from San Francisco will be the President Adams, scheduled to depart June 17. The President Jackson will sail from San Francisco July 1, and the President Van Buren from San Francisco July 15.

The President Adams will call at Honolulu, Manila, Hongkong, Singapore, Penang, Belawan Deli, Colombo, Port Said, Naples, Marseilles and New York.

The President Jackson will call at Honolulu, Manila, Hongkong, Singapore, Penang, Belawan Deli, Colombo, Port Said, Naples, Marseilles and New York.

The President Van Buren will call at Honolulu, Manila, Hongkong, Singapore, Penang, Belawan Deli, Colombo, Port Said, Naples, Marseilles and New York.

Rates and reservations may be obtained from Dollar Steamship Lines, 311 California street, San Francisco.

Sea Transportation Course at U. C. Extension

The University of California extension division will inaugurate its course in sea transportation at 7:30 p.m. today in room 1 of the Mining building on the Berkeley campus.

Standard Oil Will Build Five Large Tankers

Standard Oil will build five of the largest oil tankers in the world for service on the Venezuela-United States run, Alexander Forward, president of the Standard Oil Company of California, announced yesterday.

The ships, each of 28,000 deadweight tons, will be capable of carrying 16,000 barrels of crude oil.

The first ship will be launched in the summer of 1949, Forward said, and the last one will be completed in 1950.

Mrs. Rogers Pledges Last Ditch Fight

Vets' Bills Given Good Chance in House

WASHINGTON June 8 (UP)—Chairman Edith Nourse Rogers of the House Veterans Committee today said she has been assured by Republican leaders that several veterans bills will be given floor action in the House before adjournment.

Mrs. Rogers (R-Mass.) said the bills would provide additional benefits available to disabled veterans. She said servicemen are almost certain to reach the White House before Congress gives quite that to. Others have a "good chance" of those actions, she said.

The Massachusetts Republican Congresswoman said she will not give up the fight for the bills, even if the GOP steering committee fails to include the bills in the calendar of "must business" to be now drawn up for next week.

Mrs. Rogers renewed an ultimatum that she would resign as committee chairman if the leadership does not reschedule the bills for floor action.

The bills Mrs. Rogers regards as most likely to pass through are:

1. One to increase the monthly disability allowance for veterans of World War II or $15 and of World War I to $20.

2. An amendment to the mustering-out pay bill to provide that veterans have a right to provide for giving specially designed automobiles to veterans who lost their legs.

3. A bill to change the monthly compensation payments to veterans who are 40 per cent or more disabled and who have families to support. Such a veteran would receive an additional $30 a month for his wife and $20 more for a child.

4. A bill to increase the monthly compensation payments for widows from $50 to $75.

5. An amendment to the mustering-out pay bill to provide that veterans have a right to provide for giving specially designed automobiles to veterans who lost their legs.

It would be extended for another year to insure that servicemen who are still being treated by Army hospitals for war injuries will not be discriminated against.

A bill to change the monthly compensation payments to veterans who are 40 per cent or more disabled and who have families to support. Such a veteran would receive an additional $30 a month for his wife and $20 more for a child.

The Problems Of Auto Registration

California, the leading state in the nation in number of privately owned automobiles, has four faults in position with the power motor devoured in initiative and renewal of registrations and licenses.

At best three to four months have been required annually just to be sure new license plates to California drivers.

Back in 1946 a legislative committee investigated the situation and recommended all manual paper work to be taken over by machine.

Now, Director of Motor Vehicles Ralph Tenpenny of Motor Vehicles a machine installation surpassed in only two other State organizations in the Nation—one being the California Department of Employment.

THE ANSWER

This new the machines are in operation. And therein lies the answer to the tangle that has kept California motorists waiting for their license plates, their registration, slips or other certificates of ownership.

It is not that the legislature was wrong in their recommendations. Or that the motor vehicle department is blameworthy agents. It is just that the department was not prepared for the sudden emergence of the computer age to the offices.

Now, with the machines in operation getting into the swing of machine work and A. H. Henderson director of the department promises all motorists will have their registration slips by the end of this month.

That is, the 845,000 first-of-the-year applicants still without registration slips will have them. It will take an addition of 40 to 45 days to get the slips to the 1,500,000 drivers who renew under the staggering of registrations—and of those and new cars who have under study the first of the year.

IT'S BIG REGISTRATION

What a new important Henderson says before the operation—is a rule of licenses and renewals will be handled by the new machines by late March or the very machines that have worked the past year or so.

When first put in operation the machines found it was woefully inadequate experienced operators. That's when Director Tenpenny made an effort to get out from under the pile of 3,078,531 registration applications California motorists chartered them with department auditors began to farm out the work.

The motor vehicle offices in Redwood City, Oakland and San Jose were given some of the work. Private concerns also were contracted. Rental firms in San Francisco, San Francisco Los Angeles, Redwood City and Glendale were pools of war trained labor still existed.

MANY SLIPS

Today some 13,000 pink slips are being processed and mailed daily. The present operation alone can turn out 25,000 to 30,000 white slips daily.

And before next years flood of registration renewals comes around the department experts in have installed of experienced machine operators trained to handle the work without delay.

Here's how simple soon avoiding. Only will become January 1948.

To the mail you will receive directions. Examples of that registration slip handed and ready for your steering wheel. Simply fill in the blanks in accordance with the sample slips per your last year's one with it. The other will be validated and returned to you immediately.

That's all there is to it — thanks to the machines.

MORE EMPLOYMENT

Director Tenpenny does not anyone out of work. He has assured by the department said A. H. Henderson, director of motor vehicles under the new setup. And the operation need a little more money. But in a State where close to 4,000,000 automobiles are registered and others re-registered annually and the number is growing steadily—the use of machines is essential.

Before Mr. Unregistered Motorist wants to know, what do I do

EXHIBIT No. 3

[Title of District Court and Cause.]

Affidavit of Dr. Ronald M. Troup

United States of America,
Northern District of California—ss.

State of California,
County of Alameda

Before me, Ralph W. Weilerstein, an employee of the Federal Security Agency, Food and Drug Administration, designated by the Federal Security Administrator, under authority of the Act of January 31, 1925, c. 124, sec. 1, 43 Stat. 803, and Reorganization Plan No. IV, Secs. 12-15, effective June 30, 1940, to administer or take oaths, affirmations, and affidavits, personally appeared Dr. Ronald M. Troup in the County and State aforesaid, who, being first duly sworn, deposes and says:

(1) I am a licensed physician in the State of California with a degree of Doctor of Medicine from the Southwest School of Medicine, Kansas City, Missouri. I am on the Medical Staff of the Hahnemann Hospital, San Francisco.

(2) I am currently President of both the San Francisco County Homeopathic Medical Society and of the California State Homeopathic Medical Society.

(3) I am engaged in the general practice of

medicine employing the principles of homeopathy in my practice.

(4) I have examined the labeling of a sample of Ri-co Tablets, the product currently under seizure in the Northern District of California, Civil Action No. 24872-H. The labeling declares the ingredients to be "Lithium Benzoicum, Ammonium Phos., Lycopodium."

(5) I have been asked by representatives of the United States Food and Drug Administration whether, in my opinion, these Ri-co Tablets would be therapeutically useful in the treatment or cure of arthritis or rheumatism or their symptoms according to the principles of homeopathy.

(6) At their request I have examined advertisement clippings from the Rocky Mountain News, Denver, Colorado, October 1, 1946, and the San Francisco Chronicle, June 7, 1948, which create the impression that these Ri-co Tablets are therapeutically useful in the treatment and cure of arthritis and rheumatism.

(7) In my opinion as a homeopathic physician, I feel that I would express the unanimous opinion of the homeopaths when I state that they would deplore the production and sale of this combination and its broad and indefinite diagnostic basis and that they would certainly deny acceptance of it as a prescription having either possibilities or worth.

(8) The statement "according to the principles of Homeopathy" it does thus and so is a blunt and plain untruth for no such combination was ever proven by the homeopaths. I am very certain that its use has been very limited and that at least close to one hundred per cent of homeopaths have not given it at all.

(9) The article is not homeopathic because homeopathy does not treat disease by name or diagnostic label. It is not homeopathic because according to the principles of homeopathy each of its ingredients establishes an individual symptom reaction and reversely in prescribing for illness the patient must exhibit symptoms that match the drug or there results no action or reaction returning that patient to health.

(10) In my opinion, it is the consensus of Homeopathic physicians that a lay person cannot use an article such as Ri-co efficaciously in the self-treatment of any disease because a lay person is not properly trained to make the detailed diagnosis which is required to differentiate between the indications for various homeopathic drugs.

/s/ RONALD M. TROUP.

Subscribed and sworn to before me at Berkeley this 27th day of August, 1948.

/s/ RALPH W. WEILERSTEIN,
Employee of the Federal Security Agency, designated under Act of January 31, 1925, and Reorganization Plan IV effective June 30, 1940.

[Endorsed]: Filed Feb. 21, 1950.

EXHIBIT No. 4

Affidavit of Dr. Howard M. Engle

United States of America,
Northern District of California—ss.

State of California,
County of San Francisco

Before me, Ralph W. Weilerstein, an employee of the Federal Security Agency, Food and Drug Administration, designated by the Federal Security Administrator, under authority of the Act of January 31, 1925, c. 124, sec. 1, 43 Stat. 803, and Reorganization Plan No. IV, Secs. 12-15, effective June 30, 1940, to administer or take oaths, affirmations, and affidavits, personally appeared Dr. Howard M. Engle in the County and State aforesaid, who, being first duly sworn, deposes and says:

(1) I am a specialist in the field of Internal Medicine and a graduate of the Hahnemann Medical College and Hospital of Philadelphia. I am chief of the Medical Staff of the Hahnemann Hospital, San Francisco.

(2) I have been engaged in the practice of medicine in the City of San Francisco since 1897. I am a Fellow of the American Medical Association. I have my offices at 450 Sutter Street in San Francisco. I have been trained in and daily practice the principles of Homeopathy in connection with my practice of medicine.

(3) I have examined the labeling of a sample

of Ri-co Tablets, the product currently under seizure in the Northern District of California, Civil Action No. 24872-H. The labeling declares the ingredients to be "Lithium Benzoicum, Ammonium Phos., Lycopodium."

(4) I have been asked by representatives of the United States Food and Drug Administration whether, in my opinion, these Ri-co Tablets would be therapeutically useful in the treatment or cure of arthritis or rheumatism or their symptoms according to the principles of homeopathy.

(5) At their request I have examined advertisement clippings from the Rocky Mountain News, Denver, Colorado, October 1, 1946, and the San Francisco Chronicle, June 7, 1948, which create the impression that these Ri-co Tablets are therapeutically useful in the treatment and cure of arthritis and rheumatism.

(6) In my opinion as a Homeopathic physician and a specialist in the treatment of chronic diseases, including arthritis, I may state that the statement in the advertising that this formula has stood the test of time and has been widely used by many Homeopathic physicians, is false since I have never heard of the combination of chemicals referred to nor have I heard of any Homeopathic physician who uses it. I would further state that the claim in the advertisement that "according to the principles of Homeopathy, improves the symptoms of muscular or ligamentous pain

and stiffness due to arthritis or rheumatism except when accompanied by a febrile condition" is a complete misstatement of anything recognized as homeopathic practice.

(8) It is my opinion that this article cannot, according to the consensus of Homeopathic physicians, be used efficaciously in the self-treatment of a disease condition.

/s/ HOWARD M. ENGLE.

Subscribed and sworn to before me at San Francisco this 26th day of August, 1948.

/s/ RALPH W. WEILERSTEIN,
Employee of the Federal Security Agency, designated under Act of January 31, 1925, and Reorganization Plan IV effective June 30, 1940.

[Endorsed]: Filed Feb. 21, 1950.

EXHIBIT No. 5

Affidavit of Dr. Frances Baker

United States of America,
Northern District of California—ss.

State of California,
County of San Francisco

Before me, Ralph W. Weilerstein, an employee of the Federal Security Agency, Food and Drug Administration, designated by the Federal Security

Administrator, under authority of the Act of January 31, 1925, c. 124, sec. 1, 43 Stat. 803, and Reorganization Plan No. IV, Secs. 12-15, effective June 30, 1940, to administer or take oaths, affirmations, and affidavits, personally appeared Dr. Frances Baker in the County and State aforesaid, who, being first duly sworn, deposes and says:

(1) I am a physician and surgeon with a degree of Doctor of Medicine licensed to practice in the State of California.

(2) I am Director of the Department of Physical Medicine at the University of California Hospital, San Francisco. I am Assistant Clinical Professor of Orthopedics at the University of California Medical School. I have been a member of the Arthritis Committee at the University of California Medical School, for over ten years. I have performed research in the field of arthritis and with respect to remedies offered for that disease. I regularly treat patients with arthritis daily and am thoroughly familiar with the disease conditions known as arthritis and rheumatism.

(3) I have examined the labeling of a sample of Ri-co Tablets, the product currently under seizure in the Northern District of California, Civil Action No. 24872-H. The labeling declares the ingredients to be "Lithium Benzoicum, Ammonium Phos., Lycopodium."

(4) I have examined advertisement clippings from the Rocky Mountain News, Denver, Colorado,

October 1, 1946, and the San Francisco Chronicle, June 7, 1948, which create the impression that these Ri-co Tablets are therapeutically useful in the treatment and cure of arthritis and rheumatism.

(5) In my opinion as a specialist in the treatment of arthritis these tablets would be of no value in the treatment or cure of arthritis or rheumatism nor in the relief of the symptoms of those disorders nor in improving the symptoms of muscular or ligamentous pain and stiffness due to arthritis or rheumatism whether or not accompanied by a febrile condition because these diseases and their symptoms are due to structural changes and functional changes in the bones, muscles, ligaments and joints which would not be affected by any of these ingredients.

(6) The ingredients above referred to are not considered by the consensus of medical experts nor by any physician whom I know as of any value in the treatment of arthritis or rheumatism or their symptoms.

/s/ FRANCES BAKER, M.D.

Subscribed and sworn to before me at San Francisco this 26th day of August, 1948.

/s/ RALPH W. WEILERSTEIN,
Employee of the Federal Security Agency, designated under Act of January 31, 1925, and Reorganization Plan IV effective June 30, 1940.

[Endorsed]: Filed Feb. 21, 1950.

EXHIBIT No. 6

Affidavit of Dr. Windsor C. Cutting

United States of America,
Northern District of California—ss.

State of California,
County of San Francisco.

Before me, Ralph W. Weilerstein, an employee of the Federal Security Agency, Food and Drug Administration, designated by the Federal Security Administrator, under authority of the Act of January 31, 1925, c. 124, sec. 1, 43 Stat. 803, and Reorganization Plan No. IV, Secs. 12-15, effective June 30, 1940, to administer or take oaths, affirmations, and affidavits, personally appeared Dr. Windsor C. Cutting in the County and State aforesaid, who, being first duly sworn, deposes and says:

(1) I am a Doctor of Medicine duly licensed to practice in the State of California. I am Professor of Therapeutics at the Stanford University Medical School in the Department of Pharmacology and Therapeutics.

(2) Therapeutics is the branch of medicine which has to do with the application of procedures and drugs in the treatment of disease conditions.

(3) I am the author of a book "Manual of Clinical Therapeutics" which has achieved nation-wide acceptance and has been printed in several editions.

(4) I have examined the labeling of a sample of Ri-co Tablets, the product currently under seizure in the Northern District of California, Civil Action No. 24872-H. The labeling declares the ingredients to be "Lithium Benzoicum, Ammonium Phos., Lycopodium."

(5) I have examined advertisement clippings from the Rocky Mountain News, Denver, Colorado, October 1, 1946, and the San Francisco Chronicle, June 7, 1948, which create the impression that these Ri-co Tablets are therapeutically useful in the treatment and cure of arthritis and rheumatism.

(6) In my opinion as a specialist in therapeutics, the article Ri-co would be of no value in the treatment of arthritis or rheumatism or their symptoms because the article contains no ingredient which is of any recognized therapeutic value in the treatment of these diseases. The ingredients themselves have actions which are well known and none of which are recognized as of any value in the alleviation of the symptoms or the conditions of arthritis, rheumatism, muscular or ligamentous pain and stiffness with or without febrile conditions.

(7) In my opinion, it would be the consensus of experts in the field of therapeutics that the article Ri-co would be of no benefit for any of the conditions for which it is offered in the advertising clippings referred to above.

/s/ WINDSOR C. CUTTING,
Signature

Subscribed and sworn to before me at San Francisco this 26th day of August, 1948.

/s/ RALPH W. WEILERSTEIN,
Employee of the Federal Security Agency, designated under Act of January 31, 1925, and Reorganization Plan IV effective June 30, 1940.

[Endorsed]: Filed Feb. 21, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true and correct copies of orders entered on the minutes of this Court, in the above-entitled case, and that they constitute the Apostles on Appeal herein, as designated by the Appellant, to wit:

Libel of Information.

Order for Warrant of Arrest and Writ of Monition.

Warrant of Arrest and Writ of Monition.

Stipulation for Change of Venue.

Order for Change of Venue.

Certificate of Clerk of the District Court of the United States for the District of Colorado as to certain papers.

Monition and Marshal's Return.

Claim of Owner.

Exceptions to Libel.

Order Overruling Claimant's Exceptions.

Answer to Libel.

Demand of Claimants and Respondents for Trial by Jury.

Motion for Summary Judgment.

Minute Order of November 10, 1949—Order that Motion for Summary Judgment Be Submitted and Continued for Decision.

Minute Order of November 16, 1949—Order that Motion for Summary Judgment Be Granted; Further Order that Claimant's Application For Leave To Salvage Seized Tablets For Relabeling Be Denied.

Findings of Fact and Conclusions of Law.

Decree of Condemnation and Destruction.

Petition for Appeal.

Order Allowing Appeal.

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

Writ of Destruction.

Order Extending Time to Docket.

Citation on Appeal.

Designation of Errors and Statement of Points Relied Upon On Appeal.

Praecipe for Apostles On Appeal And Designation Of Portions Of Record, Proceedings And Evidence To Be Contained In Record on Appeal.

Reporter's Transcript for Wednesday, November

16, 1949—Decision On Motion For Summary Judgment.

Exhibits 1, 2, 3, 4, 5, 6, 7 and 8, attached to Brief in Support Of Motion For Summary Judgment, Filed October 15, 1948.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of February, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12483. United States Court of Appeals for the Ninth Circuit. Alberty Food Products Co., a copartnership, consisting of Ada J. Alberty, Harry R. Alberty, Helen M. Alberty Hackworth, Kenneth J. Hackworth, Florence M. Alberty St. Clair and Margaret M. Alberty Quinn, Appellant, vs. United States of America, Appellee. Apostles on Appeal. Appeal from the United States District Court for the Northern District of California Southern Division.

Filed February 21, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12483

UNITED STATES OF AMERICA,
Libelant and Appellee,

vs.

33 BOTTLES, MORE OR LESS, OF AN ARTICLE LABELED IN PART "RI-CO TABLETS HOMEOPATHIC COMBINATION APP. 275 TABLETS"

ALBERTY FOOD PRODUCTS CO., a Copartnership Consisting of ADA J. ALBERTY, HARRY R. ALBERTY, HELEN M. ALBERTY HACKWORTH, KENNETH J. HACKWORTH, FLORENCE M. ALBERTY ST. CLAIR and MARGARET M. ALBERTY QUINN,
Claimant and Appellant.

APPELLANT'S STATEMENT OF POINTS RELIED UPON ON APPEAL

Appellant hereby refers to points (1 to 5), inclusive, of its assignment of errors and statement of points relied upon on appeal heretofore filed with the Clerk of the District Court of the United States for the Northern District of California, Southern Division, and certified to the above entitled court by said Clerk as part of the record on appeal, and adopts the same as its statement of points relied

upon on appeal in accordance with the provisions of Rule 19, Subdivision 6, of the Rules of the above entitled court.

HAUERKEN, AMES &
ST. CLAIR

By /s/ GEORGE H. HAUERKEN,
Attorneys for Claimant
and Appellant.

Receipt of Copy attached.

[Endorsed]: Filed February 24, 1950.

[Title Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF THE RECORD MATERIAL TO THE CONSIDERATION OF THE APPEAL AND TO BE PRINTED

Appellant hereby designates the following parts of the record certified to the above entitled court by the Clerk of the District Court of the United States for the Northern District of California, Southern Division, as the parts of the record material to the consideration of the appeal and to be printed:

(1) Libel of information (Record, Vol. 1, No. 1).

(2) Order for warrant of arrest and writ of monition (Record, Vol. 1, No. 2).

(3) Warrant of arrest and writ of monition (Record, Vol. 1, No. 3).

(4) Stipulation for change of venue (Record, Vol. 1, No. 4).

(5) Order for change of venue (Record, Vol. 1, No. 5).

(6) Monition and marshal's return (Record, Vol. 1, No. 9).

(7) Claim of owner (Record, Vol. 1, No. 10).

(8) Exceptions to libel, not including the memorandum of points and authorities in support of exceptions to libel (Record, Vol. 1, No. 15).

(9) Order overruling claimant's exceptions (Record, Vol. 1, No. 21).

(10) Answer to libel (Record, Vol 1, No. 24).

(11) Motion for summary judgment without any of the exhibits attached to the brief in support of the motion (Record, Vol. 1, No. 26).

(12) Minute order of November 10, 1949 (Record, Vol. 1, no No.).

(13) Minute order of November 16, 1949 (Record, Vol. 1, no No.).

(14) Findings of fact and conclusions of law (Record, Vol. 1, No. 32).

(15) Decree of condemnation and destruction (Record, Vol. 1, No. 33).

(16) Petition for appeal (Record, Vol. 1, No. 35).

(17) Order allowing appeal (Record, Vol. 1, No. 36).

(18) Notice of appeal (Record, Vol. 1, No. 37).

(19) Writ of destruction (Record, Vol. 1, No. 38).

(20) Order extending time to docket (Record, Vol. 1, No. 42).

(21) Citation on appeal (Record, Vol. 1, No. 43).

(22) Assignment of errors and statement of points relied upon on appeal (Record, Vol. 1, No. 44).

(23) Praecipe for apostles on appeal and designation of portions of record, proceedings, and evidence to be contained in record on appeal (Record, Vol. 1, No. 45).

(24) Certificate of the Clerk of the District Court of the United States for the Northern District of California, Southern Division, to apostles on appeal (Record, Vol. 1, no No.).

(25) Appellant's statement of points relied upon on appeal filed in the above entitled court.

(26) This designation.

HAUERKEN &
ST. CLAIR,

By /s/ GEORGE H. HAUERKEN,
Attorneys for Appellant.

Receipt of Copy attached.

[Endorsed]: Filed April 13, 1950.

[Title Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD MATERIAL TO THE APPEAL AND TO BE PRINTED

Appellee hereby designates the following parts of the record certified to this Court by the Clerk of the District Court of the United States for the Northern District of California, Southern Division, as additional parts of the record which are material to the consideration of this appeal and which should be printed:

(1) Demand of claimants for trial by jury. (Record, Vol. 1, No. 25.)

(2) Certain affidavits as listed below which are attached to the Government's Brief in Support of Motion for Summary Judgment, except that the brief itself is not to be printed. (Record, Vol. 1, No. 27.)

(a) Affidavit of McKay McKinnon, Jr., together with Exhibits A, B, and C attached thereto. (Ex. 2 of Brief.)

(b) Affidavit of Dr. Ronald M. Troup. (Ex. 3 of Brief.)

(c) Affidavit of Dr. Howard M. Engle. (Ex. 4 of Brief.)

(d) Affidavit of Dr. Frances Baker (Ex. 5 of Brief.)

(e) Affidavit of Dr. Windsor C. Cutting (Ex. 6 of Brief.)

(3) Reporter's transcript of proceedings on November 16, 1949. (Record, Vol. 2, No. 40.)

(4) This designation.

FRANK J. KENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant United States
Attorney.

[Endorsed]: Filed April 18, 1950.

Subject Index

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No. 12,483

IN THE

United States Court of Appeals

For the Ninth Circuit

ALBERTY FOOD PRODUCTS CO., a copartnership consisting of ADA J. ALBERTY, HARRY R. ALBERTY, HELEN M. ALBERTY HACKWORTH, KENNETH J. HACKWORTH, FLORENCE M. ALBERTY ST. CLAIR and MARGARET M. ALBERTY QUINN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal to the United States Court of Appeals for the Ninth Circuit from a decree in admiralty of the District Court of the United States for the Northern District of California, Southern Division, ordering the condemnation and destruction of a drug under the provisions of the Federal Food, Drug, and Cosmetic Act.

JURISDICTION OF THE DISTRICT COURT AND OF THE COURT OF APPEALS.

This proceeding was begun in the District Court of the United States for the District of Colorado by the filing by the United States of a libel of information (Apostles on Appeal, p. 2) seeking the condemnation of 33 bottles of "Ri-Co Tablets" under the provisions of the Federal Food, Drug, and Cosmetic Act, 21 U. S. Code, Sections 301 *et seq.*

The libel alleged that appellant Alberty Food Products Co. (hereinafter referred to as Alberty) shipped the Ri-Co Tablets, an article of drug, in interstate commerce from California to Colorado; that the tablets were then within the jurisdiction of the District Court for the District of Colorado; and that they were misbranded within the meaning of Section 352(f) (1) of the Act in that their labeling failed to bear adequate directions for use. The libel prayed for seizure, condemnation and disposition of the tablets in accordance with the provisions of the Act.

The tablets were seized by the U. S. Marshal for the District of Colorado. (Apostles on Appeal, p. 8.)

In accordance with the provisions of 21 U. S. Code, Section 334(a) Alberty and the United States thereafter stipulated to a change of venue from the District Court for the District of Colorado to the District Court for the Northern District of California, Southern Division (Apostles on Appeal, p. 9), and an appropriate order was made changing the venue to the District Court for the Northern District of California, Southern Division. (Apostles on Appeal, p. 11.)

After the filing by Alberty of a claim of owner (Apostles on Appeal, p. 14) and an answer denying that the tablets were misbranded as alleged in the libel (Apostles on Appeal, p. 18), the United States filed a motion for summary judgment. (Apostles on Appeal, p. 21.) The motion was granted and the decree of condemnation and destruction from which this appeal is taken was entered accordingly.

The appellate jurisdiction of this court rests upon 28 U. S. Code, Section 1291.

The decree of condemnation and destruction was entered on November 29, 1949. Alberty's petition for appeal and the order allowing the appeal were both filed on December 16, 1949. (Apostles on Appeal, pp. 33-34.) On the same day Alberty filed its notice of appeal, which notice had theretofore been served on the United States. (Apostles on Appeal, p. 34.)

After the docketing of the cause in this court, the United States filed a motion to dismiss the appeal on the ground that, the tablets having theretofore been destroyed by the U. S. Marshal pursuant to the decree of condemnation and destruction, the case had become moot. The motion was briefed and argued and was thereafter denied by this court without prejudice to its being renewed at the time of the hearing of the cause on the merits.

STATEMENT OF THE CASE.

Alberty is the manufacturer of Ri-Co Tablets, a homeopathic combination used for the relief of arthritis and rheumatism and sold in small bottles of approximately 275 tablets. (Apostles on Appeal. pp. 58-59.) Each bottle is labeled as follows:

(Front Panel)
Ri-Co
Tablets
Homeopathic
Combination
App. 275 Tablets
Each Tablet Contains:
Lithium Benzoicum
Ammonium Phos.
Lycopodium
Mfg. for and Packed by
Alberty Food Prod.
Hollywood, Calif.

(Side Panel)

Directions:

Three tablets with a cupful of hot water. Take four times daily. Before meals and on going to bed.

(Side Panel)

Directions:

Three tablets with a cupful of hot water. Take four times daily. Before meals and on going to bed.

(Apostles on Appeal, p. 57.)

The United States contends that that label does not bear "adequate directions for use" within the mean-

ing of Section 352(f) (1) of the Act, because it does not indicate the conditions for which the tablets are used, and that the tablets are therefore misbranded. In other words, the United States contends that the label of a drug cannot be said to bear adequate directions for its use within the meaning of the Act, even though it does indicate *how* the drug is to be used, unless the conditions for which the drug is to be used are also indicated on the label.

Alberty contends, however, that the requirement of "adequate directions for use" is fully complied with by directions on the label as to how the drug is to be used and that the Act does not require that the label include a statement of the conditions for which the drug is used.

In addition to that question of statutory construction, the question was also raised in the District Court of whether the summary judgment procedure provided by the Federal Rules of Civil Procedure is applicable in a condemnation proceeding under the Federal Food, Drug, and Cosmetic Act. It is Alberty's contention that, since the Act provides that the procedure in condemnation cases "shall conform, as nearly as may be, to the procedure in Admiralty" (21 U. S. Code, Section 334(b)), a summary judgment, which is of course unknown to the practice in Admiralty, cannot be rendered. The District Court rejected that contention, however, holding that the summary judgment procedure is applicable to a condemnation case under the Act as if such a proceeding were an ordinary civil case. The question of the cor-

rectness of that ruling of the District Court is also raised on this appeal.

Moreover, even assuming that a summary judgment is proper in a condemnation proceeding, Alberty contends that a summary judgment was improper in this proceeding, since a genuine issue of fact remains as to which Alberty is entitled to a jury trial.

Paragraph 4 of the libel raises the question of whether the directions given by Alberty for the use of the tablets are "adequate for its intelligent and effective use". It is Alberty's contention that the question of what is and what is not adequate for the intelligent and effective use of a drug is a question of fact as to which it is entitled to the determination of a jury.

Finally, the question was raised in the District Court of whether, assuming that the labeling of the tablets did not comply with the Act, the court should allow Alberty to re-label them. The court exercised its discretion against allowing the re-labeling of the tablets. That ruling, however, is not questioned on this appeal.

As part of its argument against re-labeling, the United States filed affidavits questioning the effectiveness of Ri-Co Tablets for the relief of arthritis and rheumatism, while, in support of its contention that re-labeling should be allowed, Alberty argued that a previous decision of the Federal Trade Commission authorizing it to use the proposed new label was in effect *res judicata* as to its right to re-label the tablets.

Neither the question of the effectiveness of the tablets nor the question of whether the ruling of the Commission was *res judicata,* however, is raised on this appeal. In the District Court, both questions were raised only in so far as they affected Alberty's right to re-label. Since that question of Alberty's right to re-label is not raised on this appeal, it follows that neither the question of the effectiveness of the tablets nor the question of the effect of the ruling of the Commission is now before this court. In fact, it must be noted that, even in passing upon the question of Alberty's right to re-label, the District Court did not rule on the effectiveness of the tablets. In its decision on the motion for summary judgment, the court stated:

> "I am not holding that Ri-Co tablets are worthless. That issue actually was not presented to me." (Apostles on Appeal, p. 50.)

Similar language is found in the findings. (Apostles on Appeal, p. 28, Finding 15.)

It must also be noted that, although Alberty did not file affidavits supporting the effectiveness of Ri-Co Tablets for the relief of arthritis and rheumatism, it did not concede and does not concede that the tablets are not effective for the purposes for which they are used. Alberty fully expects to have to try the question, whether in this proceeding or in another proceeding, of the effectiveness of Ri-Co Tablets. Alberty accordingly chose not to disclose at this time the evidence upon which it intends to rely when the question

of the effectiveness of the tablets is tried. It may be that, had Alberty filed counter-affidavits, the District Court would have allowed the re-labeling of the tablets. The filing of counter-affidavits would have had no bearing on any other issue in the case, however, and, since that issue is now removed from the case, the fact that Alberty filed no counter-affidavits can have no bearing on this appeal.

With the exception therefore of the procedural issues of whether a summary judgment can be granted in a condemnation proceeding and whether a summary judgment should have been granted in this proceeding, the only issue before this court is the issue of whether the Act requires that the directions for the use of the tablets include a statement of the conditions for which they are used.

SPECIFICATIONS OF ERROR.

Assignments of error 1, 2, 3, 4 and 5 (Apostles on Appeal, p. 39) are relied upon by Alberty.

ARGUMENT.

(1) SPECIFICATIONS OF ERROR 4 AND 5.

Specifications of error 4 and 5 will be discussed first because they both relate to the procedural question of whether a summary judgment was proper in this case.

> "(4) The court erred in deciding this case under rules applicable to civil cases instead of deciding it under rules applicable to admiralty

cases, and particularly in holding that the summary judgment procedure provided by rule 56 of the Federal Rules of Civil Procedure is applicable to a proceeding for the condemnation of a drug and in applying that procedure to this condemnation proceeding.

"(5) The court erred in finding and holding that no genuine issue as to any material fact remains unresolved with respect to the question of whether Ri-Co Tablets were misbranded; the court accordingly erred in granting the motion for summary judgment."

Rule 56 of the Federal Rules of Civil Procedure provides that a summary judgment can be obtained by "a party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment". It is clear, under the very wording of the rule, that the United States was not entitled to a summary judgment for, in a condemnation proceeding, the United States is not in the position of "a party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment".

Even if the rule could be stretched so as to cover condemnation proceedings, it should not be so stretched, since the Food, Drug, and Cosmetic Act specifically provides that the procedure in condemnation cases "shall conform, *as nearly as may be,* to the procedure in admiralty." (21 U. S. Code, Section 334(b), italics supplied.) To stretch Rule 56, a rule of *civil procedure,* so as to make it apply to condemnation cases would certainly not make the procedure

in such cases conform, *as nearly as may be,* to the procedure in admiralty.

Although the precise question of whether a motion for summary judgment can be made in a condemnation proceeding has not yet been passed upon, the following cases make it clear that admiralty practice should be adhered to at all stages of such a proceeding:

United States v. 149 Gift Packages, etc. (District Court E.D.N.Y., 1943), 52 F. Supp. 993. The court granted a motion to strike a counterclaim seeking a declaratory judgment on the ground that the legal sufficiency of a libel in a condemnation proceeding should be tested by exceptions and not by a counterclaim seeking a declaratory judgment.

United States v. 720 Bottles, etc. (District Court E.D.N.Y., 1944), 3 F.R.D. 466. The court held, *upon a motion of the United States,* that the provisions of the Federal Rules of Civil Procedure regarding the taking of depositions did not apply to condemnation proceedings under the Food, Drug and Cosmetic Act.

In any event, however, a summary judgment was improper, since this case presents a genuine issue of fact as to which Alberty is entitled to a jury trial. The pleadings raised the question of whether the directions given by Alberty for the use of the tablets are "adequate for its intelligent and effective use". The question of what is intelligent and effective like the question of what is reasonable is a question peculiarly within the province of a jury. Since such a question

of fact is thus presented in the case, summary judgment was improper.

Gifford v. Travelers Protective Ass'n. (C.C.A. 9, 1946), 153 Fed. (2d) 209;

Koepke v. Fontecchio (C.C.A. 9, 1949), 177 Fed. (2d) 125.

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(2) SPECIFICATIONS OF ERROR 1, 2 AND 3.

Specifications 1, 2 and 3 will be discussed together because they all relate to the question of whether or not the act requires that the directions for the use of the tablets include a statement of the conditions for which the tablets are used.

> "(1) The court erred in holding that Ri-Co Tablets were misbranded and in ordering their condemnation and destruction.
>
> "(2) The court erred in finding and holding that the labeling of Ri-Co Tablets fails to bear adequate directions for use in that it does not declare the diseases or conditions of the body for which Ri-Co Tablets are offered to the public by appellant and for which appellant intends them to be used.
>
> "(3) The court erred in finding that appellant 'does not seriously contend that the Ri-Co Tablets are not misbranded as they are presently labeled'."

Alberty is charged with a violation of Section 352(f)(1) of 21 U.S. Code. That section provides as follows:

"A drug or device shall be deemed to be misbranded—

"* * *

"(f) Unless its labeling bears (1) adequate directions for use; * * *"

It is apparent that Section 352(f)(1) does not in terms require the labeling of a drug to include a statement of the conditions or symptoms for which the drug is used. All that in terms is required is "adequate *directions for use*". (Italics supplied.)

The Federal Food, Drug, and Cosmetic Act contains specific requirements as to what must be included on the label of a drug. The act leaves nothing to implication. In fact, as will hereinafter appear, the very section which Alberty is alleged to have violated provides that, under certain circumstances, a label must indicate the conditions for which a drug should *not* be used. It is obvious, therefore, that when Congress intended that reference be made on a label to certain conditions, Congress knew how to specifically say so. Accordingly, the fact that Congress did not provide that every label should state the conditions *for* which the particular drug is used, must be taken to mean that Congress did not intend to make the lack of such statement misbranding under the Act.

Section 352 of the Act provides that a drug shall be deemed to be misbranded:

(1) "Unless its label states 'the name and place of business of the manufacturer'.

(2) "Unless its label contains 'an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count'.

(3) "If it is for use by man and contains any quantity of the narcotic or hypnotic substance alpha eucaine, barbituric acid, betaeucaine, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heron, marihuana, morphine, opium, paraldehyde, peyote, or sulphonmethane; or any chemical derivative of such substance, which derivative has been by the Administrator, after investigation, found to be, and by regulations designed as, habit forming; unless its label bears the name, and quantity or proportion of such substance or derivative and in juxtaposition therewith the statement 'Warning—May be habit forming.'

(4) "If it is a drug and is not designated solely by a name recognized in an official compendium unless its label bears (1) the common or usual name of the drug, if such there be; and (2) in case it is fabricated from two or more ingredients, the common or usual name of each active ingredient, including the quantity, kind, and proportion of any alcohol, and also including, whether active or not, the name and quantity or proportion of any bromides, ether, chloroform, acetanilid, acetphenetidin, amidopyrine, antipyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glucosides, mercury, ouabain, strophanthin, strychnine, thyroid, or any derivative or preparation of any such substances, contained therein: *Provided,* That to the extent that compliance with the requirements of clause (2) of

this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Administrator.

(5) "Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: *Provided,* That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Administrator shall promulgate regulations exempting such drug or device from such requirement.

(6) "If it has been found by the Administrator to be a drug liable to deterioration, unless it is packaged in such form and manner, and its label bears a statement of such precautions, as the Administrator shall by regulations require as necessary for the protection of the public health. No such regulation shall be established for any drug recognized in an official compendium until the Administrator shall have informed the appropriate body charged with the revision of such compendium of the need for such packaging or labeling requirements and such body shall have failed within a reasonable time to prescribe such requirements.

(7) "If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof."

Congress was well aware that the label of a small bottle could contain only a limited amount of information. Yet, in addition to directions for use, it required information that could easily take up all the space available on the label. It is clear therefore that the words "adequate directions for use" must have been intended to refer only to a brief statement of the dosage (a statement which can easily be included within the limits of a label) and not to a detailed statement of all conditions or symptoms for which the drug is used (a statement which in many instances could not be included within the limits of the label).*

A short statement of how the drug is to be taken—how much, how often, in what manner, at what times, for how long—and how it is to be prepared for use, as for example a direction to "shake well before using", is all that is needed to make the use of the drug safe and effective. It cannot have been intended that the label should also contain a treatise on symptoms and conditions, yet, in many cases, a mere statement of symptoms or conditions would be misleading

*It is true that Section 352(f)(1) requires the directions for use to appear on the "labeling" of the drug and that Section 321(m) defines "labeling" as including the "label" on the immediate container and all other "accompanying" literature. This use of the more inclusive term "labeling" is nullified, however, by Section 352(c) which deems a drug misbranded unless all information required to appear on the labeling be placed thereon in such a manner as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use. An attempt to place any of the required "directions for use" on accompanying literature would therefore be met by the contention that the ordinary purchaser customarily relies on the label itself and discards accompanying literature.

without a full explanation for which no space is available on the label.

That the Act does not contemplate that the diseases or conditions need appear on the labeling is made clear by its legislative history. A forerunner of the bill which finally passed provided that a drug would be misbranded if its labeling included the name of any disease for which it was not a cure but only a palliative and failed to state that the drug was a palliative and how the palliation was effected. Mr. W. G. Campbell, the then Commissioner of Food and Drugs, stated in discussing that provision (Senate Hearings on S. 2800, 73rd Congress, 2nd Session, p. 589):

> "Bear in mind that this paragraph applies *in those cases only where the name of a disease appears on the label.*" (Italics supplied.)

It is thus clear that, at that time, the Food and Drug Administration itself regarded the requirement of "adequate directions for use" as giving an option to the manufacturer to decide whether conditions for use should be stated on the labeling.

The intention of Congress is further shown by its rejection of the language of an earlier bill (S. 1944) which required that the labeling contain "complete and explicit" directions for use. Although that requirement went too far and Congress rejected it in favor of the lesser requirement of "adequate" directions for use, the Food and Drug Administration is now seeking to read it back into the Act.

It must also be remembered that we are dealing with criminal legislation. Although a condemnation

proceeding may not itself be a criminal proceeding, it results in the forfeiture of property and the same misbranding which forms the basis of a condemnation proceeding can be the basis of a criminal proceeding resulting in fine and imprisonment. (21 U. S. Code. Section 333.) The requirement of "adequate directions for use" must of course be given the same meaning in a condemnation proceeding as in a criminal proceeding. To construe those words to mean more than directions as to dosage, time and manner of taking a drug, would be to deprive Section 342(f)(1) of the clarity essential to the validity of a criminal statute. As stated in *Winters v. New York,* 333 U.S. 507, 515-516:

> "The standards of certainty in statutes punishing for offenses is higher than those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' * * * There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be * * * in regard to the applicable tests to ascertain guilt."

A construction of the Act such as is advocated by the United States and was adopted by the District Court would accordingly result in depriving Alberty of its property without due process of law. See for example *Conally v. General Construction Co.,* 296 U.S. 385, 391, where the court stated:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its

without a full explanation for which no space is available on the label.

That the Act does not contemplate that the diseases or conditions need appear on the labeling is made clear by its legislative history. A forerunner of the bill which finally passed provided that a drug would be misbranded if its labeling included the name of any disease for which it was not a cure but only a palliative and failed to state that the drug was a palliative and how the palliation was effected. Mr. W. G. Campbell, the then Commissioner of Food and Drugs, stated in discussing that provision (Senate Hearings on S. 2800, 73rd Congress, 2nd Session, p. 589):

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> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its

> meaning and differ as to its application, violates the first essential of due process of law."

Since the penalty for failure to properly interpret the Act is forfeiture of property, fine and imprisonment, it should not be given the broad interpretation urged by the United States, for to do so would make it subject to grave constitutional doubts.

> *United States v. Delaware & Hudson Co.,* 213 U.S. 366, 407-8.

The very regulation which the Food and Drug Administration has issued as an interpretation of Section 352(f)(1) supports Alberty's construction of that section. That regulation provides as follows:

> "Directions for use may be inadequate by reason (among other reasons) of omission, in whole or in part * * * of * * * directions for use in all conditions for which such drug * * * is prescribed, recommended, or suggested in its labeling, or in its advertising * * * or in such other conditions, if any there be, for which such drug is commonly and effectively used; * * *" (21 Fed. Regs. (Cum. Supp.) Sec. 2.106(a).)

The most that can be said is that the regulation requires that adequate directions be given for the use of the drug in certain conditions. It does not require that the conditions themselves be stated on the label. If, for example, Ri-Co Tablets are prescribed and/or recommended and/or suggested and/or commonly and effectively used for two different conditions, the regulation, assuming it to be valid, would require that adequate directions be given on the label for their use

in one condition as well as in the other. It would be fully complied with, however, if the directions given on the label, as for example that Ri-Co Tablets be taken four times daily, were adequate for their use in both conditions. In other words, a direction that a drug be taken four times daily fully satisfies the requirement that adequate directions be given for the use of the drug in different conditions, provided the drug is to be taken four times daily in each of those conditions. Under such circumstances it would be highly unreasonable to require that the directions to take the drug four times daily be repeated on the label as many times as there are conditions for which the drug is prescribed, recommended, suggested or commonly and effectively used. In fact, the directions given on the label of Ri-Co Tablets are adequate for the use of those tablets in all conditions for which they are prescribed, recommended, suggested or commonly and effectively used.

If the Food and Drug Administration had intended to require that all conditions for which a drug is used be stated on the labeling of the drug, it would have done so by express language. Instead of doing so, however, it specified only that "directions for use" should be adequate for use in all conditions, whether it be a condition referred to in the labeling of the drug or in its advertising or a condition which is referred to neither in the labeling nor in the advertising, but for which the drug is nevertheless commonly and effectively used. In fact, the very use of the term "directions for use" as differentiated from the term "con-

ditions" clearly demonstrates that the former is not intended to include the latter.

This case is one of first impression as far as an Appellate Court is concerned. There are a few recently decided District Court cases which appear to be in point and to support the position of the United States. They are of course not binding upon this court and, with all due respect to the courts deciding them, we believe them to be wrong. We will reserve discussing them in detail until we know which of them are relied upon by the United States. Most of them give no reasons in support of their conclusions and accordingly call for no discussion. At this point, we only wish to mention that all of those cases were decided after 1947. Since both the act and the regulations were adopted in 1938, it appears that the Food and Drug Administration itself did not interpret them as requiring a statement of conditions on the labeling until almost ten years after their adoption.

It seems to be the government's position that, unless the label discloses the conditions for which a drug is used, all sorts of misrepresentations can be made outside the label and dangerous drugs can be marketed with impunity. Nothing is further from the truth. The government is armed with all the weapons it needs to prevent misrepresentations made outside the label. If, for example, false and misleading statements are made in the advertising of Ri-Co Tablets, Alberty can be prosecuted under the Federal Trade Commission Act, 15 U. S. Code, Sections 41, *et seq.,* which, incidentally, give the Federal Trade Commission and not

the Food and Drug Administration jurisdiction over the false advertising of food, drugs, devices and cosmetics. And more specifically, if representations are made outside the label as to a condition for which the tablets may be used and the government finds that the directions given on the label are not adequate for their use in that condition, the government may *then* ask that the drug be condemned under the very provisions which it seeks to enforce by the present libel. Since, under our present system of government, the Food and Drug Administration is not entrusted with the task of writing a new and different law, it may not add an entirely new requirement to the requirements of the Act by the simple device of calling a statement of the conditions for which a drug is used, a statement of directions for its use.

Although it is not spelled out in the libel, one of the main objectives of the Food and Drug Administration is to force Alberty to include in the labeling of the tablets all of the representations that are made in their advertising. If the Food and Drug Administration were to achieve that objective, it could then indirectly control Alberty's advertising claims, in disregard of the express intention of Congress that control over advertising be left to the Federal Trade Commission.

To summarize: There is no contention in the libel and there can be no contention that Ri-Co Tablets are dangerous or detrimental when taken as directed on the label. In fact, there is no contention and there

can be no contention that the tablets are at all dangerous or detrimental. There is no contention in the libel and there can be no contention that the tablets should be taken otherwise than as directed on the label. In other words, those directions, "3 tablets with a cupful of hot water. Taken 4 times daily. Before meals and on going to bed." are adequate for their use.

Under the circumstances, this court should hold that the Act does not require the label to include a statement of the conditions for which the tablets are used and should accordingly reverse the decree with instructions to dismiss the libel. In the alternative, the decree should be reversed and the question of whether the directions are adequate for the intelligent and effective use of the tablets should be left to the determination of a jury.

Dated, San Francisco, California,
June 28, 1950.

Respectfully submitted,
GEORGE H. HAUERKEN,
HAUERKEN & ST. CLAIR,
Proctors for Appellant.

No. 12,483

IN THE

United States Court of Appeals

For the Ninth Circuit

ALBERTY FOOD PRODUCTS CO., a copartnership consisting of ADA J. ALBERTY, HARRY R. ALBERTY, HELEN M. ALBERTY HACKWORTH, KENNETH J. HACKWORTH, FLORENCE M. ALBERTY ST. CLAIR and MARGARET M. ALBERTY QUINN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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No. 12,483

IN THE

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ALBERTY FOOD PRODUCTS CO., a copartnership consisting of ADA J. ALBERTY, HARRY R. ALBERTY, HELEN M. ALBERTY HACKWORTH, KENNETH J. HACKWORTH, FLORENCE M. ALBERTY ST. CLAIR and MARGARET M. ALBERTY QUINN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

I.

STATEMENT OF JURISDICTION.

Under 21 U.S.C. 334(a) and (f), the District Court had jurisdiction over the libel for condemnation proceedings involved in this appeal.

Under 28 U.S.C. 1291, this Court has jurisdiction to review the decision of the District Court provided, of

course, the appeal satisfies the fundamental requirement that it be a "case" or "controversy" within the meaning of Article 3, Section 2, of the Constitution. We believe this appeal has become moot and that this Court is without jurisdiction to entertain this appeal.

On April 3, 1950, this Court denied our motion to dismiss the appeal without prejudice to its renewal on the hearing of the cause on its merits. It is our intention to renew the motion to dismiss at the hearing. We will discuss the pertinent authorities in this brief in the part containing our argument.

II.

STATEMENT OF THE FACTS.

This case arose in the District Court of the United States for the District of Colorado, as a libel for condemnation proceeding under the Federal Food, Drug, and Cosmetic Act. [21 U.S.C. 334(a)]. By order of that Court, the case was removed to the District Court of the United States for the Northern District of California, Southern Division. (R. 11).

The libel filed by the Government charges that the drug involved, Ri-Co Tablets, was misbranded in violation of 21 U.S.C. 352(f)(1) in that its labeling failed to bear adequate directions for use since it did not state the purpose or condition for which the drug was intended. (R. 3).

The only directions contained in the labeling of the drug read as follows (R. 57):

"Three tablets with a cupful of hot water. Take four times daily. Before meals and on going to bed."

There was no statement in the labeling regarding the purpose or condition for which the drug was intended. Newspaper advertisements in the record, however, show that the drug was intended for use in the treatment, mitigation, and cure of arthritis and rheumatism. (R. 58 and 59).

On May 15, 1947, Alberty (the claimant) filed exceptions to libel. (R. 16). Essentially, these exceptions asserted that the Federal Food, Drug, and Cosmetic Act does not require the labeling of a drug to state the disease conditions for which the drug is to be used. Consequently, the exceptions challenged the sufficiency of the libel to state a cause of action.

On September 30, 1947, Judge Harris overruled the exceptions. (R. 18).

On December 1, 1947, Alberty filed an answer to the libel admitting that the Ri-Co Tablets then under seizure were a drug that had been shipped interstate. (R. 18-19).

On October 15, 1948, the Government filed a motion for summary judgment asserting that (1) there were no facts in dispute, and (2) the only legal issue had been decided in favor of the Government when the District Court overruled claimant's exceptions to libel. (R. 21).

In support of the motion for summary judgment, the Government filed an affidavit of a food and drug

representative incorporating the complete labeling of Ri-Co Tablets and two newspaper advertisements of Ri-Co Tablets. (R. 54-59). The Government also filed affidavits from prominent physicians attesting to the worthlessness of Ri-Co Tablets in the treatment or cure of arthritis or rheumatism. (R. 61-70).

Alberty filed no counter-affidavits.

On November 16, 1949, after a full hearing, the District Court granted the motion for summary judgment. The Court's considered oral opinion appears in the record on pages 43-53. The Court's findings of fact and conclusions of law appear in the record on pages 24-31. The Court's decree of condemnation and destruction is in the record on pages 32-33.

Pursuant to the writ of destruction issued by the District Court, no stay of execution having been obtained by Alberty, the United States Marshal destroyed the Ri-Co Tablets under seizure on December 14, 1949. (R. 35-37). On December 16, 1949, Alberty filed a notice of appeal. (R. 34).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution

Article 3, Section 2

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Au-

thority; * * * to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party * * *"

Federal Food, Drug, and Cosmetic Act

"Section 201. *Definitions; generally* [21 U.S.C. 321]

For the purpose of this chapter—

(g) The term 'drug' means * * * (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals * * *

(m) The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

"Section 304. *Seizure—Grounds and jurisdiction* [21 U.S.C. 334]

(a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found * * *

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as

nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury * * *"

"Section 502. *Misbranded drugs and devices.* [21 U.S.C. 352]

A drug or device shall be deemed to be misbranded—

(f) Unless its labeling bears (1) adequate directions for use * * *"

IV.

QUESTIONS INVOLVED.

Two questions relate to jurisdiction:

(1) Since the *res* in the instant proceeding has been destroyed, is this Court without jurisdiction to entertain this appeal?

(2) If this Court is without jurisdiction to entertain this appeal, should the appeal be dismissed?

If this Court does have jurisdiction, four additional questions are presented:

(3) Did the District Court err in holding that the civil rules rather than the admiralty rules govern libel for condemnation proceedings under 21 U.S.C. 334 after seizure of the allegedly offending article has been accomplished?

(4) Did the District Court err in applying the summary judgment procedure provided by Rule 56 of the Federal Rules of Civil Procedure?

(5) Was there any genuine issue of fact before the District Court?

(6) To comply with the statutory requirement that the labeling of a drug must bear adequate directions for use, is it necessary, as a matter of law, that the labeling include a statement of the diseases or conditions of the body for which the drug is offered to the public by the claimant?

V.

SUMMARY OF ARGUMENT.

A. This Court is without jurisdiction to entertain this appeal and should grant the Government's motion to dismiss.

This is an *in rem* proceeding where the continued existence of the *res* is an indispensable jurisdictional element.

The District Court ordered the Ri-Co Tablets here involved to be condemned and destroyed.

Appellant failed to obtain a stay of execution of the lower Court's judgment, and the Tablets were destroyed by the U. S. Marshal pursuant to the judgment.

With the Tablets destroyed, this proceeding has become moot and is no longer a "case" or "controversy" within the meaning of Article 3, Section 2 of the Constitution.

Where a case becomes moot on appeal through no fault of the appellant, the Appellate Court may reverse and order the suit dismissed if the ends of

justice so dictate. Here, the appeal has become moot because of the appellant's negligence. Moreover, appellant has a long history of adjudicated violations of the Federal Food, Drug, and Cosmetic Act. Consequently, there is no valid basis for putting a premium upon appellant's negligence by reversing the District Court.

The appeal should be dismissed and the judgment of the District Court should be permitted to stand.

The rest of the argument is pertinent only if this Court has jurisdiction to hear the appeal.

B. The District Court did not err in holding that the Civil Rules rather than the Admiralty Rules governed this proceeding after seizure of the res was effected.

Seizure actions under the Federal Food, Drug, and Cosmetic Act are civil in nature but by statute they conform to the admiralty procedure "as nearly as may be".

A similar provision in the predecessor law was held by the Supreme Court to mean that the admiralty rules ceased to apply beyond seizure of the property, and that thereafter the civil rules governed.

While the Courts have not been unanimous in construing the new law, the majority and better rule is that the civil rules apply once the property has been seized.

C. The District Court did not err in holding that there was no genuine issue as to any material fact, and in ruling that the labeling of a drug must state the diseases or conditions of the body for which it is offered to the public.

Ri-Co Tablets are offered to the public by Alberty for use in the treatment and cure of arthritis and rheumatism.

It is admitted that the Tablets here involved were drugs, that they moved in interstate commerce, and that their labeling did not state any disease or condition for which they were to be taken.

The only question before the District Court was whether the labeling of this drug failed to bear "adequate directions for use" in violation of 21 U.S.C. 352(f)(1).

As a matter of law, it is settled that the labeling of a drug cannot bear adequate directions for use unless it states the disease or conditions of the body for which the drug is offered to the public.

This works no hardship on honest enterprise but merely requires the unscrupulous vendor of worthless panaceas to come out in the open with his therapeutic claims.

The Government is not here seeking to regulate advertising, but is exacting full compliance with the labeling requirements of the Federal Food, Drug and Cosmetic Act.

There was no genuine issue of fact before the District Court.

D. The summary judgment procedure authorized by Civil Rule 56 was properly invoked by the District Court.

Civil Rule 56 is applicable to all civil actions.

The summary judgment procedure is an inquiry in advance of trial to determine whether there is a genuine issue of fact. Its purpose is to avoid the necessity of a futile trial where there is no genuine issue of fact.

If it appears from the pleadings and affidavits that there is no genuine issue as to any material fact and that the issue is one of law, then if the law so warrants a summary judgment should be entered.

The record before the District Court shows that there was no genuine issue of fact. Since the law warranted the entry of a summary judgment, the District Court properly invoked Civil Rule 56.

E. Conclusion.

The Court is without jurisdiction to entertain this appeal since the case has become moot by reason of the destruction of the *res*. The appeal should be dismissed without impairing the validity of the judgment of the District Court.

If this Court does have jurisdiction to consider the appeal, the judgment of the District Court should be affirmed in all respects.

VI.

ARGUMENT.

This appeal is but one small though important segment in almost two decades of litigation involving appellant's violations of the Federal food and drug laws. We feel it desirable that the Court see this case in its proper perspective in order to evaluate the arguments and objectives of the parties. Therefore we shall briefly sketch in the background of this case.

Ada J. Alberty, and the various firms through which she has operated, have long been doing an extensive interstate business in a number of articles consisting for the most part of dried plants, cereals, vitamins, minerals, and chemicals in various combinations.

Consistently, Mrs. Alberty has sold her products on the basis of false and misleading therapeutic claims ranging from restoration of original color to gray hair to restoration of lost manhood. For every affliction or aberration of mankind, physical or mental, she has a remedy that is represented to prevent or cure it.

In the enforcement of the Federal food and drug laws, dozens of Mrs. Alberty's products have been seized and condemned in various judicial districts. See, for example, Drugs and Devices Notice of Judgment Nos. 829 and 2057, of which the Court may take judicial notice. *Colgrove v. U. S.,* 176 F. (2d) 614, 615 footnote 1 (C.A. 9, 1949), cert. denied 338 U.S. 911 (January 9, 1950).

At first, Mrs. Alberty's therapeutic claims for her drugs were made in labeling that was either affixed

to the drug containers or physically accompanied the drugs in their interstate movement. This permitted the Government to make the direct charge that the labeling was false and misleading in violation of 21 U.S.C. 352(a). In every such instance, where the merits of Mrs. Alberty's products were directly in issue, the Government has prevailed:

(a) In 1936, after a full trial, she was convicted in the Southern District of California on 10 Counts of a criminal information and sentenced to pay a fine of $1000 and costs of almost $1500. That conviction was upheld by this Court on appeal. *Alberty v. U. S.*, 91 F. (2d) 461 (C.A. 9, 1937).

(b) In 1937, she was convicted in the Southern District of California on a plea of *nolo contendere* to a criminal informtion and fined $150. Notice of Judgment, F.D., 28688.

(c) In 1942, after a full trial, 10 of her products were condemned and ordered destroyed by the U. S. District Court for the Northern District of California. Drugs and Devices Notice of Judgment No. 829.

Thereafter, Mrs. Alberty's promotional methods became more sophisticated. Instead of shipping her false and misleading literature interstate together with the drugs to which it related, she shipped the literature separately from the drugs and at different times. This did not impair her sales since she shipped the literature and the drugs to retail stores who displayed them together to the ultimate purchasers.

Upon such facts, the Government filed another criminal information in the Southern District of California. By stipulation, it was admitted that the claims made in the literature were false and misleading. The only question presented to the Court was whether the literature, which was shipped interstate 71 days before the drug, constituted "labeling" within the meaning of the Act. The District Court held that it did. *U. S. v. Alberty,* 65 F. Supp. 945 (S.D. Calif., 1946). However, this Court reversed, pointing out defects in the criminal information. *Alberty v. U. S.,* 159 F. (2d) 278 (C.A. 9, 1947).

It is now settled that where literature and drugs are shipped interstate as parts of an integrated distribution program, the literature accompanies the drugs and constitutes labeling even though shipped separately and at a different time from the drug. *Kordel v. U. S.,* 335 U.S. 345 (1948); *U. S. v. Urbuteit,* 335 U.S. 355 (1948).

The *Kordel* and the *Urbuteit* cases served merely as a challenge to Mrs. Alberty. To circumvent them, she resorted to several techniques, in some instances such as the present one actually anticipating the Supreme Court's ruling. Thus she shipped the Ri-Co Tablets interstate without making any therapeutic claims in her labeling. Sales promotion was achieved through therapeutic claims made in newspaper advertising. (R. 58). The identical situation also appears in a seizure action pending in the U. S. District Court for the District of Columbia. *U. S. v.*

Various Quantities . . . "Instant Alberty Food", 83 F. Supp. 882, 885 (1949).

Obviously, Mrs. Alberty's theory is that since her therapeutic claims are false and misleading, and cause her drugs to be misbranded when the claims appear in the labeling, she can avoid violation of the law merely by eliminating the claims from the labeling. However, in both the instant case and the District of Columbia case, the District Courts have held that her drugs are misbranded if their labeling does not state every ailment of the body for which they are actually held out to the public.

Even while these cases are pending, Mrs. Alberty has developed other sales-promotion techniques. From retail stores throughout the country, she has obtained large mailing lists of persons who are susceptible to the type of merchandise she vends. She now mails interstate vast quantities of false and misleading literature direct to those persons, and stamps on such literature the name and address of the retail store, in the vicinity of the addressee, where her drugs can be bought.

In a final effort to deal with this situation at its source, the Government has filed a Complaint for Injunction against Mrs. Alberty and her firm in the Southern District of California (No. 10,322-WM Civil). The Complaint involves 29 drugs. One of the issues in that proceeding is whether the literature, as she now ships it, constitutes the labeling of the

drugs to which it relates. That case is set for trial on September 19, 1950.

Actually, we have spoken only of litigation under the Federal Food and Drugs Act of 1906 and the Federal Food, Drug, and Cosmetic Act of 1938. In addition, Mrs. Alberty has been involved in considerable litigation under the Federal Trade Commission Act. See, for example, *Ada Alberty v. Federal Trade Commission,* 118 F. (2d) 669 (C.A. 9, 1941), cert. denied 214 U.S. 630; *Ada J. Alberty v. Federal Trade Commission,* 182 F. (2d) 36 (C.A.D.C., 1950).

We turn now to the specific issues before this Court.

A. THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THIS APPEAL AND SHOULD GRANT THE GOVERNMENT'S MOTION TO DISMISS.

All in all, the United States Marshal seized 8 bottles of Ri-Co Tablets pursuant to the process that issued upon the filing of the Libel in this cause. (R. 8). Since the retail price per bottle is two dollars, the total value was $16.

Pursuant to the Writ of Destruction issued by the District Court on November 29, 1949, the United States Marshal destroyed the 8 bottles of Ri-Co Tablets on December 14, 1949. (R. 35-37). This was done in compliance with Rule 62(a) of the Federal Rules of Civil Procedure. Consequently, the *res* which was the subject of this action is no longer in existence.

This case arose as a seizure action under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 334(a)]. Such suits are directed against the offending articles themselves and are deemed to be *in rem* proceedings. *United States v. 935 Cases . . . Tomato Puree,* 136 F. (2d) 523, 525 (C.A. 6, 1943), cert. denied 320 U.S. 778.

Since the decree of condemnation of the District Court provided for the destruction of said Ri-Co Tablets, and inasmuch as the decree has been executed by their destruction, we submit that the proceedings are at an end.

The identical situation was involved in *United States v. 3 Unlabeled 25-Pound Bags Dried Mushrooms,* 157 F. (2d) 722 (C.A. 7, 1946), where condemnation proceedings under the Federal Food, Drug, and Cosmetic Act had been instituted against mushrooms alleged to be adulterated. After trial, a decree of condemnation and destruction was entered. An appeal was taken to the Court of Appeals, but since no stay of the decree had been obtained by the claimant of the product, the Marshal destroyed the mushrooms. In dismissing the appeal as moot, the Court of Appeals, per Minton, J., said at page 723:

> "The continued existence of the mushrooms is essential to our right to proceed against the things themselves. The action is an action in rem. In such a proceeding, there is no party defendant. The goods stand to answer. They are the offenders. Day v. Micou, 85 U.S. 156, 162, 21 L. Ed. 860; National Bond & Investment Co. v. Gibson, D. C., 6 F. (2d) 288, 290.

"The decree of the District Court goes against the mushrooms. The decree having been entered and executed, the proceeding is functus officio.

"Counsel for the Government readily admits the matter is moot here and counsel for the claimant reluctantly admits it is moot, but both parties ask us to decide the issue between them. This we decline to do. If we were to affirm the judgment, the District Court could not destroy the mushrooms. They have already been destroyed. If we reversed the judgment, there would be no mushrooms to restore to the claimant. The cause is clearly moot. We are not authorized to decide arguments but only 'cases and controversies'."

A closely analogous situation arose in *Eureka Productions, Inc. v. Mulligan,* 108 F. (2d) 760 (C.A. 2, 1940). There Eureka had imported a motion picture film into the United States. The Collector of Customs seized it on the ground that it was obscene. The Government then filed a libel in the District Court, charging that the film was obscene and asking for its destruction. Eureka intervened as claimant, and the case was tried before a jury which returned a verdict that the film was obscene. The District Court then entered a judgment ordering that the film be forfeited and destroyed.

Eureka filed a notice of appeal but did not get an order staying execution of the writ of destruction. Several days later, Mulligan, the U. S. Marshal, destroyed the film in obedience to the writ of destruction. The appeal was later dismissed in the Court of

Appeals for the Second Circuit on the ground that the film had already been destroyed.

Thereafter, Eureka sued Mulligan for damages contending that the case was in admiralty and that the mere filing of an appeal suspended execution of the decree.

The Court of Appeals held that the condemnation suit was an action at law, and affirmed the District Court in dismissing the damage suit. At page 761, the Court made some remarks that are relevant to Alberty's contention in the instant case that the present proceeding is governed entirely by the admiralty rules:

> "* * * In the case of seizures on land, suit for condemnation of the thing seized, though brought in the form of a libel of information in admiralty and governed to some extent by Admiralty Rule 22 * * *, is inevitably an action at law. The Sarah, 8 Wheat. 391, 5 L. Ed. 644; Morris's Cotton, 8 Wall. 507, 19 L. Ed. 481; Confiscation Cases, 20 Wall. 92, 22 L. Ed. 320. * * * The resemblance to a suit in admiralty does not go beyond the process and the initial pleadings, even in cases where the statute providing for confiscation directs that the proceedings shall conform to proceedings in admiralty as near as may be. In re Graham, 10 Wall. 541, 19 L. Ed. 981; 443 Cans of Frozen Egg Product v. United States, 226 U.S. 172, 33 S. Ct. 50, 57 L. Ed. 174."

It is clear, therefore, since the subject matter of the instant litigation has been destroyed, that the

cause is moot and no case or controversy exists under Article 3, Section 2, of the Constitution. See *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft,* 239 U.S. 466, 475-476; *St. Pierre v. United States,* 319 U.S. 41. Cf. *Fiswick v. United States,* 329 U.S. 211, 220-223.

Despite these principles, counsel for Alberty argued, in opposition to the original Motion to Dismiss the appeal, that this Court should determine the merits of the case because of the alleged effect that the District Court judgment would have on Alberty. The contention was that if the appeal is dismissed and the judgment of the District Court permitted to stand, the government could institute multiple seizures of Ri-Co Tablets all over the country pursuant to 21 U.S.C. 334(a). Moreover, through the operation of *res judicata,* claimant would be deprived of an opportunity to defend. We suggest that this argument is without substance.

Claimant appears to be saying this: That it will be seriously prejudiced by the failure of this Court to review the merits of the case. But the mere fact that the claimant has placed himself in a position which may result in prejudice to him does not confer jurisdiction on a court. In an ordinary case, a party who fails to appeal within the prescribed time cannot be heard to complain, in a subsequent suit, that the merits of his case were never passed on by an appellate tribunal and that therefore the lower Court judgment should be given no effect. We see no difference between that situation and the one at bar.

appeal. *This appeal became moot, not by an act of God or a war, but by Alberty's negligence in failing to obtain a stay of execution of the judgment.* At the oral argument on the Motion to Dismiss, this Court observed that an appellant has a duty to protect his right of appeal. As a corollary to that, we urge that appellant should not be given an opportunity to snatch victory from defeat *as a result of its own negligence* in perfecting its appeal.

There can be no argument that the equitable principles enunciated by the Supreme Court in the *Hamburg* case are most commendable. We think likewise that those principles should be applied to serve the ends of justice, and to promote respect rather than disdain for the law. Alberty's objective is to circumvent the Federal Food, Drug, and Cosmetic Act by constant probing for loopholes in technicalities. If this Court should declare the appeal moot but reverse the judgment of the District Court, Alberty would feel that this Court had helped her to "get around" the law.

For the foregoing reasons, we respectfully submit that this appeal is moot and should be dismissed, and that the judgment of the District Court should be permitted to stand.

The remainder of this brief is pertinent only if the Court decides it has jurisdiction to hear this appeal on its merits.

B. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE CIVIL RULES RATHER THAN THE ADMIRALTY RULES GOVERNED THIS PROCEEDING AFTER SEIZURE OF THE RES WAS EFFECTED.

The pertinent statutory provision, 21 U.S.C. 334(b), reads:

> "The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury * * *"

This provision is a part of the Federal Food, Drug, and Cosmetic Act enacted in 1938.

The predecessor law repealed by the Act of 1938 was the Federal Food and Drugs Act of 1906. It contained a provision almost identical with the above-quoted section.

> 21 *U.S.C.A.* 14 (34 Stat. 771)
>
> "* * * The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case. * * *"

This provision was construed by the Supreme Court in *443 Cans of Frozen Egg Product v. United States,* 226 U.S. 172 (1912). In that case, the Government filed a libel alleging that the Frozen Egg Product was adulterated. After a trial without a jury, the District Court dismissed the libel.

The Government appealed to the Court of Appeals contending that the admiralty rules were applicable and that it was therefore entitled to a review *de novo.* The Court of Appeals reviewed the case upon the facts, reversed the judgment of the District Court, and entered a decree of condemnation. [193 Fed. 589].

The Supreme Court reversed, stating on page 183:

> "We do not think it was intended to liken the proceedings to those in admiralty beyond the seizure of the property by process *in rem,* then giving the case the character of a law action, with trial by jury if demanded and with the review already obtaining in actions at law."

It will be noted that the narrow question before the Supreme Court was whether the admiralty or the civil rules govern these cases *on appeal,* though the ruling of the Court is broader in scope since it indicates the admiralty rules are not applicable after seizure of the property.

With the enactment of the Federal Food, Drug, and Cosmetic Act of 1938, and the concomitant adoption of the Federal Rules of Civil Procedure, there was some uncertainty regarding the point at which the admiralty rules ceased to be applicable. Thus in the early years of enforcement of the Act of 1938, several cases held that the admiralty rules apply even after seizure of the property. On page 10 of its opening brief, Appellant cites two of these cases, *U.S. v. 149 Gift Packages, etc.,* 52 F. Supp. 993 (E.D.N.Y.,

1943), and *U.S. v. 720 Bottles . . . Vanilla Extract,* 3 F.R.D. 466 (E.D.N.Y., 1944). An analysis of these cases reveals that the results would probably have been the same had the civil rules been held to apply.

However, there is now an imposing group of authorities in support of the proposition that the civil rules apply in these seizure actions as soon as the property proceeded against has been seized.

U.S. v. 88 Cases . . . Birely's Orange Beverage, 5 F.R.D. 503 (D.N.J., 1946);

U.S. v. 300 Cans . . . Black Raspberries, et al., 7 F.R.D. 36 (N.D. Ohio, 1946);

U.S. v. 935 Cases . . . Tomato Puree, 136 F. (2d) 523, 525 (C.A. 6, 1943), cert. den. 320 U.S. 778;

U.S. v. 20 Cases . . . Jell-O, 77 F. Supp. 231 (S.D.N.Y., 1947).

See also

Eureka Productions, Inc. v. Mulligan, 108 F. (2d) 760, 761 (C.A. 2, 1940);

C.C. Co. v. U.S., 147 F. (2d) 820, 824 (C.A. 5, 1945).

As the Court said recently in *United States v. 5 Cases . . . Figlia Mia Brand,* 179 F. (2d) 519 (C.A.2, 1950):

> "It now appears well-established that the Rules of Civil Procedure do apply to condemnation proceedings."

In view of these developments, the Government has abandoned its earlier position that the admiralty rules

apply in seizure actions beyond apprehension of the property. For some time now, the discovery procedure authorized by the Federal Rules of Civil Procedure has been regularly invoked in seizure actions by claimants and by the Government. Likewise, the Government has sought and obtained summary judgments under Civil Rule 56(a) in such cases. (R. 45). Such procedure is available to claimants also.

In summary, it is clear from the authorities that these seizure actions are basically civil in nature. The admiralty procedure is adopted for the limited purpose of utilizing an established method of apprehending property in an *in rem* proceeding. Beyond apprehension of the property, there is no reason in logic why the admiralty rules should apply. The trial in such a case may be with or without a jury, as the claimant elects. [21 U.S.C. 334(b)]. Where trial is by jury, then the civil rules must perforce apply since the admiralty rules do not contemplate jury trials. To say that the admiralty rules apply where a jury is waived is to declare that the same type of proceeding may be governed by admiralty or civil rules depending upon the wishes of the claimant. It should be noted that in the instant case, Alberty demanded a jury trial. (R. 20).

We submit that the District Court did not err in holding that the civil rules governed this case after the apprehension of the Ri-Co Tablets.

C. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT, AND IN RULING THAT THE LABELING OF A DRUG MUST STATE THE DISEASES OR CONDITIONS OF THE BODY FOR WHICH IT IS OFFERED TO THE PUBLIC.

From the pleadings (R. 2-4, and 18-19) and from the labeling of the Ri-Co Tablets involved (R. 57), three significant facts stand out as admitted:

(1) These Tablets were drugs.

(2) They moved in interstate commerce.

(3) Their labeling did not state any disease or condition for which the tablets were to be taken.

If any question remained whether these tablets were drugs within the meaning of 21 U.S.C. 321(g)(2), their intended use in the treatment and cure of arthritis and rheumatism is clear from their newspaper advertising. (R. 58, 59).

The only question before the District Court was whether the labeling of said Tablets failed to bear adequate directions for use in violation of 21 U.S.C. 352(f)(1). This, we submit, was a *question of law,* in view of the admission that the labeling failed to state any disease or condition for which the tablets were recommended.

That this question was recognized by Alberty as one of law is clear from the Exceptions to Libel which it filed. (R. 16-17). In the Exceptions, Alberty contended that the libel was insufficient since the labeling merely failed to include information which the statute did not require. These Exceptions were overruled. (R. 18).

Under the holdings of this Court and a number of others, we believe it settled that the labeling of a drug cannot bear adequate directions for use unless it states the diseases or conditions of the body for which the drug is intended.

In *Colgrove et al. v. United States,* 176 F. (2d) 614, 615 (C.A. 9, 1949), cert. denied 338 U.S. 911 (January 9, 1950), this Court sustained a conviction for criminal contempt where Colgrove, in violation of an injunction issued under the Act of 1938, had shipped drugs interstate with labeling that mentioned only four disease conditions, although his newspaper advertising mentioned eight additional disease conditions. Failure of the defendant to print on the labeling all of the disease conditions mentioned in newspaper advertising, was sufficient basis to hold that the labeling of his drugs did not bear adequate directions for use.[2]

Another significant case on this point is *United States v. Various Quantities . . . "Instant Alberty Food,"* 83 F. Supp. 882 (D.D.C., 1949). Alberty is the claimant in that case also. In its Answer there, Alberty argued as an affirmative defense that the statutory provision regarding adequate directions for use in the labeling "does not require that the labeling of a drug state the diseases or conditions of the body for

[2]In a subsequent proceeding after the defendants put the disease conditions in the labeling, *U.S. v. Colusa Remedy Co.* (S.D. Calif., 8572-WM Civil, June 10, 1949), the District Court issued another injunction permanently restraining the defendants from shipping these drugs interstate with false and misleading therapeutic claims in their labeling.

which the drug when used as directed will be effective, nor does it require that the labeling of a drug state each of the diseases and conditions of the body for which the drug is advertised as a therapeutic treatment." [83 F. Supp. 884].

This affirmative defense was stricken on motion of the Government, the Court observing on page 885:

> "The words, 'adequate directions for use', necessarily relate to some purpose which is to be served by the use, and that purpose must be consistent with the intent of the Act as a whole to protect the public health. For what purpose are drugs used? Obviously, as a remedy for some ailment of the body. *It seems equally obvious that no drug can be said to contain in its labeling adequate directions for its use, unless every ailment of the body for which it is, through any means, held out to the public as an efficacious remedy be listed in the labeling,* together with instructions to the user concerning the quantity and frequency of dosage recommended for each particular ailment. See the following unreported cases, cited in the government's brief: United States v. 150 Pkgs. Bush Mulso Tablets, D.C.E.D.Mo., 83 F. Supp. 875; United States v. 516 Cases, Nue-Ovo, D.C.S.D.Col.
>
> "It may be that compliance with this requirement, thus freeing the shipper from any liability under Section 352(f)(1), would result in the drug being misbranded under Section 352(a) of the Act; and doubtless this is the precise result which was intended in those cases where false and misleading advertising claims are made which are omitted from the labeling." [Emphasis added]

See also:

U. S. v. 150 Packages . . . Bush Mulso Tablets, 83 F. Supp. 875 (E.D. Mo., 1947);

Kleinfeld, *Applicability of the Federal Food, Drug, and Cosmetic Act to Drug Advertising,* Volume 5, Food Drug Cosmetic Law Journal (CCH), page 45, 48-53 (March 1950).

Drugs marketed for ultimate lay use fall into two broad categories: (1) Those which laymen purchase and use without the prescription of a physician, and (2) those which are dispensed to lay users only on the prescription and with the directions of a physician.

By enacting the various subsections comprising Section 502 of the Act [21 U.S.C. 352], Congress clearly sought to develop reasonable and effective safeguards for the public in its use of drugs. The statute is affirmative in its demand that the labeling of a drug intended for lay purchase and use without a physician's prescription bear adequate directions for use, supplying the consumer with information essential to intelligent lay use.[3] In House Report No. 2139, 75th Cong., 3d Session, page 8, the House Committee on Interstate and Foreign Commerce stated:

> "Other provisions of section 502 are designed to require the labeling of drugs and devices *with*

[3]The statute [21 U.S.C. 352(f)] and regulations authorized thereunder [21 Code of Federal Regulations (1949 Ed.), § 1.106(b)] provide that prescription drugs be exempt, on certain conditions, from the requirement that their labeling bear adequate directions for use.

information essential to the consumer. The bill is not intended to restrict in any way the availability of drugs for self-medication. On the contrary, it is intended to make self-medication safer and more effective. For this purpose provisions are included in this section requiring the appropriate labeling of habit-forming drugs, *requiring that labels bear adequate directions for use,* and warnings against probable misuse, and setting up appropriate provisions for deteriorating drugs." [Emphasis added.]

It is difficult to conceive of any information which could be more essential to the consumer regarding a drug which he can purchase without a physician's prescription than a statement or enumeration of the disease conditions for which the drug is to be used. Indeed, without such statement or enumeration no directions for the use of such a drug can be considered adequate under this statute.

The statutory words "adequate directions for use" cannot be construed *in vacuo,* but must be considered in relation to the information they convey to the lay public and to the efficient administration of the statute. Labeling not only serves to inform the ultimate consumer, but also performs the vital function of providing a means of determining compliance with, or violation of, the Act. *McDermott v. Wisconsin,* 228 U.S. 115, 132 (1913); *Arner Co., Inc. v. U.S.,* 142 F. (2d) 730, 734 (C.A. 1, 1944), cert. denied 323 U.S. 730. How can the adequacy of mechanical instructions for the intake or application of a drug be ascertained

for enforcement purposes except in relation to specific diseases, an enumeration of which must form an integral part of the directions for use?

How could it possibly be known whether certain directions for the use of a drug are adequate unless it is known what the drug is to be used for? Unless the statutory requirement of adequate directions for use in the labeling is a futility, the directions in the labeling must refer to the use of the drug in specifically enumerated conditions of disease. Furthermore, where a drug is offered to the public in newspaper advertising for certain disease conditions, it is no imposition upon the legitimate manufacturer to require him to state all of those conditions in the labeling together with directions adequate for its use in those conditions.

The Congressional purpose in requiring that adequate directions for use appear upon the labeling of a drug was to protect the public health. Adequate directions for use are required to enable the purchasing public to practice self-medication safely and effectively by providing information upon the basis of which a person might intelligently dose himself. The complete protection to consumers contemplated by the misbranding provisions of 21 U.S.C. 352(f) is apparent when other requirements of the section are considered. Sec. 352(f) requires that the labeling be completely informative to facilitate intelligent self use. Section 352(a) requires this information to be given truthfully and without misleading implication. Sec-

tion 352(j) requires that the drug be safe for use under the conditions prescribed, recommended or suggested in the labeling. Considering these three requirements together it will be seen that if a manufacturer or shipper is permitted to make claims for his drugs outside of the labeling and is not required to include in the labeling representations specifying all of the diseases or conditions for which he intends his product to be used, paragraphs (f), (a) and (j) of section 352 are reduced to a nullity.

To consider directions such as "Three tablets with a cupful of hot water. Take four times daily. Before meals and on going to bed." (See R. 58) as being adequate, would mean that this product could never be charged under section 352(a) with bearing misleading statements in the labeling—there is no indication on the labeling of the conditions for which these directions are to be followed, nor can the labeling be charged with giving untruthful information when it gives no information at all. Nor could this product be charged with violating section 352(j) if it was dangerous to health when taken as directed for the disease or conditions for which the distributor recommends or suggests it outside of the labeling. The same reasoning applies where the manufacturer or distributor does enumerate some of the symptoms, diseases and conditions in the labeling but fails to enumerate others for which the product is suggested outside of the labeling. The key provision is in section 352(f)(1). That is designed to make the affirmative

requirement of informative labeling. When its requirements are met, the other two provisions are given significant meaning. All of the informative labeling must be true and without misleading implications (352(a)), and the drug must be safe for use when used in the manner directed (352(j)).

In *United States v. Dotterweich,* 320 U.S. 277, 280 (1943), the Supreme Court enunciated a rule of construction for this statute which is particularly appropriate here:

> "The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. *Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of Government and not merely as a collection of English words.*" [Emphasis added.]

And in *United States v. Antikamnia Chemical Co.,* 231 U.S. 654, 665, 667 (1914), a case arising under the Food and Drugs Act of 1906, which preceded the instant legislation, the Supreme Court pointed out:

> "The purpose of the act is to secure the purity of foods and drugs *and to inform purchasers of what they are buying.* Its provisions are directed to that purpose and must be construed to effect it."
>
> * * * * * * *
>
> *"The purpose of the law is the ever insistent consideration in its interpretation."* [Emphasis added.]

See also pronouncements of this Court in *Research Laboratories, Inc. v. United States,* 167 F. (2d) 410, 421 (C.A. 9, 1948), cert. denied 335 U.S. 843 (1948); *Pasadena Research Laboratories v. United States,* 169 F. (2d) 375, 379 (C.A. 9, 1948), cert. denied 335 U.S. 853 (1948).

As we have shown, one of the purposes of Section 502(f)(1) [21 U.S.C. 352(f)(1)] is to assure that lay use of a drug in self-medication will be safe in those conditions or diseases for which the drug is offered to the public. If this section were to be interpreted as authorizing the omission from the labeling of the conditions of disease for which the drug is offered, it would result in the creation of a serious defect in the statute permitting the very mischief intended to be redressed. Any worthless drug could then use the channels of interstate commerce with impunity, not being required to come out in the open with therapeutic representations in the labeling which would of necessity be false and misleading.

This construction of the law works no hardship on honest enterprise. As recognized by the District Court for the District of Columbia in the *Instant Alberty Food* case, *supra,* 83 F. Supp. at page 885, the omission of disease conditions from the labeling is the last resort of those who know that the mention of the disease conditions in the labeling will subject them to the charge that their drugs are misbranded under 21 U.S.C. 352(a) by reason of false and misleading therapeutic claims. If the disease conditions

are mentioned, the labeling is false and misleading. If the disease conditions are not mentioned, the labeling does not bear adequate directions for use. This is a sort of legal squeeze play by which the Government hopes to eliminate worthless panaceas from the channels of commerce.

Ri-Co Tablets are typical of the type of drug that cannot come out into the open with therapeutic claims in its labeling. As we have shown, an earlier shipment of Ri-Co Tablets with therapeutic claims in its labeling for arthritis, rheumatism, and rheumatic gout, was condemned together with a number of other Alberty products in a default decree. [Drugs and Devices Notice of Judgment 2057]. The unrefuted medical affidavits in the record substantiate the Government's contention as to the worthlessness of these Tablets. (R. 61-71). While the District Court did not find it necessary to determine whether Ri-Co Tablets are worthless, it stated: "There is no showing of any loss to humanity or posterity if the Ri-Co Tablets under seizure are destroyed." (R. 28 and 50).

Alberty's Opening Brief raises a number of points that merit little if any consideration. Thus on page 15, the argument is made that the "label" of a drug is so small that it cannot contain all the information which the Government contends the "labe*ling*" should contain; but if Alberty put "adequate directions for use" in accompanying literature which constitutes "labeling" the Government would contend that those directions must be on the "label". The

speciousness of this argument is shown by the fact that no such contention was made by the Government in Drugs and Devices Notice of Judgment 2057 or in the pending injunction suit against Alberty in the Southern District of California. In addition, the future action of the Government with respect to Alberty's labeling is entirely speculative. The requirements of the Act in this case cannot be evaded by conjuring up possibilities of other suits at some remote time.

On page 16, appellant quotes a sentence from a statement of Mr. Walter G. Campbell, formerly Chief of the Food and Drug Administration, as evidence that the Administration itself felt that it was optional with the manufacturer whether disease conditions should be stated in the labeling. The implication is that the section being discussed was a forerunner of the present Section 352(f)(1). The quotation does not bear out claimant's conclusion at all. The very first paragraph of Mr. Campbell's testimony makes clear that his comments were concerned with Section 8*(a)* of the bill under consideration. As appellant recognizes, this proposed section dealt with the requirement that once a disease name was mentioned, the labeling must also contain information as to whether the product was a cure or palliative. But this in no way involves adequate directions for use. There was, in fact, in the same draft, an entirely separate section devoted to adequate directions, namely, 8*(e)*, which read that a drug shall be deemed to be misbranded

> "if its labeling fails to bear plainly and conspicuously (1) complete and explicit directions for use * * *"

Thus it was 8(e), not 8(a) that was the predecessor of Section 352(f)(1). The section of the bill to which Mr. Campbell's comments referred does not appear in the bill as enacted. It is obviously a distortion of his testimony to imply that remarks made with respect to this section have any bearing on the interpretation of Section 352(f)(1), an entirely unrelated section that became part of the law.

On Page 17 of Alberty's opening brief, the customary charge of unconstitutionality is hurled at the Government's construction of the Act. The statute, it seems, is vague and uncertain. In an analogous case, *U.S. v. 95 Barrels . . . Vinegar,* 265 U.S. 438, 442-3 (1924), the Supreme Court said:

> "The statute is plain and direct. Its comprehensive terms condemn every statement, design, and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. *It is not difficult to choose statements, designs, and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act.*" [Emphasis added].

So in the instant statutory provision, it is not difficult to write adequate directions for use for drugs which may be safely and efficaciously used by the layman without a physician's prescription. There is nothing abstruse or mystical about this requirement. It is only necessary that the labeling of such a drug state (1) all of the diseases or conditions of the body for which it is intended, (2) how much to be taken, (3) how often to be taken, (4) how long to be taken, (5) at what times to be taken, (6) the route or method of administration or application, (7) how to prepare the drug for use (shake well, etc.), and any other information that would be necessary for the safe, intelligent, and effective use of the particular drug. [21 C.F.R. § 1.106(a)(1)-(7)]. Many such drugs are readily available for self-medication in the drug stores today.

We admit, however, that it is difficult to write "adequate directions for use" for a *worthless* drug without making false and misleading therapeutic claims. We doubt that this would support a charge of unconstitutionality. Alberty's difficulty lies not in failing to understand the statute but in trying to circumvent it.

On pages 20-22, the charge is made that the Government in this proceeding under the Federal Food, Drug, and Cosmetic Act seeks to regulate advertising. This is not true. The Government is only seeking full compliance with the labeling requirements of the Federal Food, Drug, and Cosmetic Act. If as an indi-

rect result of such compliance, a manufacturer must temper his advertising claims, that is no reason why the Government should relax its vigilance with respect to data required in the labeling.

For the foregoing reasons, we submit that there was no genuine *issue of fact* before the District Court. The only question before the Court was one of *law* which had already been decided in favor of the Government when the District Court overruled the Exceptions to Libel. (R. 18). Actually counsel for Alberty suggested to the District Court in oral argument that he would consent to a decree of condemnation if the Court would permit relabeling of the Ri-Co Tablets pursuant to a decision of the Federal Trade Commission. (R. 44). The major consideration in the District Court was whether the Court should permit relabeling of the Tablets under 21 U.S.C. 334(d), after entry of a decree of condemnation. (R. 44-53). The District Court's ruling on this point is not questioned on appeal. [Appellant's Opening Brief, page 6].

We further submit that the District Court did not err in holding that the labeling of a drug does not bear adequate directions for use under 21 U.S.C. 352(f)(1) unless, among other things, it states the diseases or conditions of the body for which the drug is offered to the public.

D. THE SUMMARY JUDGMENT PROCEDURE AUTHORIZED BY CIVIL RULE 56 WAS PROPERLY INVOKED BY THE DISTRICT COURT.

The pertinent portions of the summary judgment procedure authorized by Civil Rule 56 appear in subsections (a) and (c):

> *Civil Rule 56(a)*
>
> "A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action * * * move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

> *Civil Rule 56(c)*
>
> "* * * The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law * * *"

On page 9 of Appellant's Opening Brief, a devious argument is made that the United States, in a condemnation proceeding, is not "a party seeking to recover upon a claim, etc." within the meaning of Civil Rule 56(a). The answer to this assertion is simple. In the Notes of Advisory Committee on Rules, the very first sentence relating to this Rule reads:

> "This rule is applicable to *all* actions, including those against the United States or an officer or agency thereof." [Emphasis added].

On page 11 of its opening brief, Appellant cites two decisions of this Court apparently to support its argument that a summary judgment was improper in this case:

> *Gifford v. Travelers Protective Ass'n of America,* 153 F. (2d) 209 (C.A. 9, 1946);
>
> *Koepke v. Fontecchio,* 177 F. (2d) 125 (C.A. 9, 1949).

Actually, in both of these cases the summary judgment entered by the District Court was *upheld* by this Court based upon pronouncements that accord with our position.

The opinion of this Court in the *Koepke* case was written by Judge Gardner, Chief Judge of the Eighth Circuit, sitting by special designation. In another very recent opinion, *Hurd v. Sheffield Steel Corp.,* 181 F. (2d) 269 (C.A. 8, April 25, 1950), written by Judge Gardner sitting in the Eighth Circuit, there is a concise review of the significant principles that relate to summary judgment. On page 271, the Judge stated:

> "The proceeding on motion for summary judgment is not a trial but in the nature of an inquiry in advance of trial for the purpose of determining whether there is a genuine issue of fact. Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A., contemplates prompt disposition of an

action where there is in fact no genuine issue, thus avoiding the necessity of a futile trial. Either party may move for summary judgment—the plaintiff at any time after the answer has been served, and the defendant at any time after claim has been asserted against him. The burden of proof is on the moving party and the rule [56(e)] requires that affidavits supporting or opposing a motion for summary judgment shall be made on personal knowledge and set forth such facts as would be admissible in evidence and which show that the affiant is competent to testify to the facts recited in the affidavit. If it appears from the pleadings, affidavits, admissions, or depositions that there is no genuine issue as to any material fact and that the issue is one of law, then if the law so warrants a summary judgment should be entered. The question of the sufficiency of the evidence raises an issue of law and if, under the facts, the court would be required to direct a verdict for the moving party, then a summary judgment should be granted * * * [Citing cases including *Gifford v. Travelers Protective Ass'n, supra,* 153 F. (2d) 209 (C.A. 9, 1946).]."

We submit that these principles, applied to the instant case, demonstrate the correctness of the District Court's judgment. As we have shown, there was no genuine issue of fact before the Court. That the article then under seizure was a drug, that it had moved interstate, that its labeling did not state any disease or condition of the body for which it was offered—*all of these facts were conceded.* Since, as a matter of

law, the labeling of a drug fails to bear adequate directions for use, in violation of 21 U.S.C. 352(f)(1), unless it does declare the diseases or conditions of the body for which the drug is offered to the public, we submit that there was no genuine issue of fact and that the Government would have been entitled to a directed verdict had the case gone to trial before a jury.

We submit that this case was a most appropriate one in which to invoke the summary judgment procedure.

VII.

CONCLUSION.

The situation disclosed in this case is typical of what is frequently found by the Government in its effort to require compliance with the Federal Food, Drug, and Cosmetic Act. All that Act requires is simple honesty and fair dealing on the part of a drug proprietor.

Despite maximum vigilance and repeated enforcement actions, some of these drugs, including Ri-Co and other Alberty products, remain on the market for years, their proprietors constantly shifting ground, modifying their labeling representations and promotional methods, and always invoking distorted constitutional safeguards for their asserted right to defraud the American public.

Since the Ri-Co Tablets here involved were destroyed by reason of Alberty's negligence in protecting its right of appeal, it is submitted that this Court is without jurisdiction to entertain this appeal, and should dispose of the case simply by dismissing the appeal.

If the Court does have jurisdiction to consider the appeal, we submit that no error was committed in the proceedings below, and that the judgment of the District Court should in all respects be affirmed.

Dated, San Francisco, California,
July 25, 1950.

Respectfully submitted,

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No. 12,483

IN THE

United States Court of Appeals

For the Ninth Circuit

ALBERTY FOOD PRODUCTS CO., a copartnership consisting of ADA J. ALBERTY, HARRY R. ALBERTY, HELEN M. ALBERTY HACKWORTH, KENNETH J. HACKWORTH, FLORENCE M. ALBERTY ST. CLAIR and MARGARET M. ALBERTY QUINN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 12,483

IN THE

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UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

Four and one-half pages of the brief filed on behalf of the Government (page 11 to page 15, line 12, inclusive) are devoted to a discussion of unsupported charges and facts that are not part of the record on this appeal. Although the Government took the position in the District Court that the only issue in this

case was an issue of law (whether the labeling of a drug must include a statement of the conditions for which the drug is used), it now seeks to have this Court decide entirely different issues.

We do not believe, as the Government now apparently believes, that the pleadings raised the question of whether Alberty is "consistently" selling its products "on the basis of false and misleading therapeutic claims" or whether Alberty represents that it has a remedy that will prevent or cure "every affliction or aberration of mankind". If those issues are held to have been raised by the pleadings, we respectfully urge that they be first submitted to a jury, for they obviously are issues of fact. If they are held not to have been raised, the four and one-half pages of argument to which we have referred are an imposition upon this Court and should be treated as a similar imposition was treated by the District Court of Appeal of the State of California in *Cooper v. Board of Medical Examiners* (1949), 92 A.C.A. 875. The Court stated at page 877:

> "* * * Counsel for respondent is apparently not aware of some of the fundamentals governing appeals: (1) A reviewing court takes into consideration only such matters as are contained in the record on appeal; (2) unauthenticated statements in the briefs, not supported by the record, are improper and have no influence on the court; (3) Canon 22 of the Canons of Professional Ethics adopted by the American Bar Association in 1908 provides 'The conduct of the lawyer before the Court and with other lawyers should be char-

acterized by candor and fairness. It is not candid or fair for the lawyer * * * in argument to assert as a fact that which has not been proved * * * A lawyer should not * * * address to the Judge arguments upon any point not properly calling for determination by him.' * * *"

THE QUESTION OF THE JURISDICTION OF THIS COURT.

The Government first renews its motion to dismiss the appeal, presenting anew every argument which this Court rejected once before. The Government begins by assuming that the case has become moot and then proceeds to argue from that assumption. The very question at issue, however, is whether the case *has* become moot.

In *United States v. 3 Unlabeled 25-lb. Bags Dried Mushrooms* (C.C.A. 7, 1946), 157 F. (2d) 722, there was but one issue before the Court: Whether the particular shipment of mushrooms was or was not adulterated. The case was therefore truly at an end once the mushrooms were destroyed. Similarly, in *Eureka Productions v. Mulligan* (C.C.A. 2, 1940), 108 F. (2d) 760, there was but one issue before the Court: Whether the particular motion picture was or was not obscene. The case was therefore truly at an end once the motion picture was destroyed. This case, however, was not brought to an end by the destruction of the tablets, for the decision of the District Court affects not only this particular shipment, but all of

the Ri-Co Tablets which may be found throughout the United States.

Section 334 of 21 U. S. Code provides as follows:

> "* * * no libel for condemnation shall be instituted * * * for any alleged mis-branding if there is pending in any court a * * * condemnation proceeding * * * based upon the same alleged mis-branding, * * * *except that such limitations shall not apply (1) when such mis-branding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this chapter* * * * " (Italics added.)

If the decision of the District Court is allowed to stand, the Government will thus be in a position to make multiple seizures of Ri-Co Tablets throughout the United States. The right not to be burdened with such multiple seizures is obviously a very valuable right to Alberty. This appeal was taken to protect that right and not just to save the shipment of Ri-Co Tablets involved in this case. Far from being moot, therefore, the case still presents the very live issue of whether the Government may or may not make multiple seizures of Ri-Co Tablets.

In connection with the motion to dismiss the appeal, we cited to this Court the case of *Mytinger & Casselberry v. Ewing* (U.S.D.C., D.C., 1949), 87 F. Supp. 650, in which the dangers of multiple seizures were vividly described. That case has now been reversed by the Supreme Court of the United States. (*Ewing v. Mytinger & Casselberry* (1950), 70 S. Ct.

870, 94 L. Ed. 776.) The Supreme Court upheld the multiple seizure provisions of the Act, notwithstanding the finding of the three-judge District Court that the Food and Drug Administration had acted "capriciously, arbitrarily, unreasonably, oppressively and unlawfully" (87 F. Supp. at 661) in making 11 separate seizures of the product involved in that case. Since multiple seizures are thus allowed even when they are they are capricious and oppressive, it becomes doubly important that no such seizures be made simply on the authority of an unreviewed decision of the District Court.

The Supreme Court of the United States has heretofore decided an analogous question adversely to the Government. In *Fiswick v. United States,* 329 U.S. 211, 91 L. Ed. 196, the defendant was convicted of conspiring to defraud the United States and sentenced to imprisonment for 18 months. By the time the case reached the Supreme Court, he had served his sentence, and it was accordingly contended that the case had become moot and that the appeal should be dismissed. Since the defendant was an alien and, as such, his conviction could lead to deportation and denial of naturalization, the Court held that the case had not become moot. In reversing the judgment, the Court stated:

> "Thus Fiswick has a substantial stake in the judgment of conviction which survived the satisfaction of the sentence imposed on him. In no practical sense, therefore, can Fiswick's case be said to be moot." (91 L. Ed. 203.)

In this case, Alberty has a similar stake in the decree of condemnation and that stake survived the satisfaction of the decree by the destruction of the tablets. *In no practical sense, therefore, can it be said that case has become moot.*

If this Court should feel, however, that this case has become moot, it should follow the practice adopted by the Supreme Court of the United States in such cases and, instead of dismissing the appeal, reverse the decree of condemnation and instruct the District Court to dismiss the libel. In *Brownlow v. Schwartz,* 261 U.S. 216, 67 L. Ed. 620, for example, the plaintiff sought a writ of mandate to compel the issuance of a building permit. The writ was denied by the trial Court, but the Court of Appeals reversed and ordered the permit to be issued. *The defendant failed to obtain a stay.* The permit was issued and since the building was built before the case reached the Supreme Court, that Court held that the case had become moot. It refused to allow the decision of the Court of Appeals to stand, however, even though that decision was that the permit be issued, and reversed the judgment in its entirety with instructions that the petition for the writ of mandate be dismissed.

To the same effect, see the following cases:

United States v. Hamburg-Amerikanische Co., 239 U.S. 466, 60 L. Ed. 387;

Heitmuller v. Stokes, 256 U.S. 359, 65 L. Ed. 990;

Alejandrino v. Quezon, 271 U.S. 528, 70 L. Ed. 1071;

Bracken v. Securities & Exchange Commission, 299 U.S. 504, 81 L. Ed. 374;

Leader v. Apex Hosiery Company, 302 U.S. 656, 82 L. Ed. 508.

If this appeal were now dismissed without giving Alberty an opportunity to have this Court pass upon its merits, the decision of the District Court might become *res judicata* and preclude Alberty from re-litigating, *as to any of its products,* the question of whether directions for the use of a drug are sufficient under the Act, even though the labeling does not state the conditions for which the drug is used.

On page 19 of its brief, the Government suggests that this argument (that the operation of the rules regarding *res judicata* would preclude Alberty from re-litigating the question as to any of its products) is "without substance". We perhaps do not know what "substance" means, but we nevertheless wish to point out the following: On March 5, 1950, the Solicitor General of the United States filed a petition for writs of certiorari to review the two companion cases decided by the Court of Appeals for the 8th Circuit in *United States v. Munsingwear,* 178 F. (2d) 204. The petition was granted on April 24, 1950 (94 L. Ed. 591), and the two cases are now pending in the Supreme Court of the United States where they are numbered 23 and 24. The point raised by the Solicitor General as the sole basis for his petition is the very same point, which, to the Food and Drug Administration, is without substance. On page 2 of his petition,

the Solicitor General states the "question presented" as follows:

> "Whether a judgment denying an injunction, the appeal from which has been dismissed as moot, can, despite the frustration of appellate review, stand as a bar to re-litigation of the identical issue by the same parties, but in a suit for damages."

The Solicitor General makes a very able argument in support of the proposition that the judgment should not bar re-litigation of the issue in another action between the same parties. Until he is sustained by the Supreme Court, however, it can only be said that the question is open and that a dismissal of this appeal might well later be held to bar re-litigation by Alberty of the issue litigated in the Court below.*

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*The facts in the *Munsingwear* cases were as follows: In 1944, the United States brought an action to enjoin Munsingwear from violating a price control regulation. In a separate count, the United States also asked for treble damages. By stipulation, the count for damages was held in abeyance until final adjudication of the injunction count.

In 1945 the United States brought another action for treble damages for a subsequent violation of the same price regulation and that second action was similarly continued pending the determination of the injunction count.

The question of the injunction was tried and decided in Munsingwear's favor, the Court holding that it had complied at all times with the price regulation. Pending an appeal by the United States, the commodity involved was de-controlled, so that the appeal was dismissed on the ground that the case had become moot.

Munsingwear then moved the trial Court to dismiss both the remaining count for treble damages and the separate action filed one year thereafter on the ground that the judgment on the injunction count was *res judicata*. The motion was granted, the United States appealed and the Court of Appeals affirmed the judgment of dismissal.

The Court of Appeals recognized that the cause of action passed upon by the trial Court in the injunction proceeding was not the

Under the circumstances, and in view of the uncertainty as to the applicable law, it may be that this Court will indicate in its decision, if it wishes to dismiss the appeal and does not wish to dismiss the entire case, that the judgment of the District Court shall not become *res judicata* in a subsequent proceeding based upon a different cause of action. Such a procedure was adopted by the Circuit Court of Appeals for the 1st Circuit in *Gelpi v. Tugwell,* 123 F. (2d) 377, 378, and is also suggested by the Solicitor General on page 2 of its petition for writs of certiorari in the *Munsingwear* case. Such a procedure would in no way prejudice the Food and Drug Administration, since the Ri-Co tablets involved in this case have already been destroyed, and it would give Alberty the opportunity to have the question of the sufficiency of its labels passed upon by an Appellate Court. The very same issue is admittedly involved in the *Alberty* case now pending in Washington, D. C. (See brief for appellee, page 13.) If Alberty should ultimately prevail at the trial of that case, the Food and Drug Administration will appeal. If Alberty should ultimately lose at the trial of that case, it will have to appeal or the decision of the trial court in

---

same as the cause of action involved in either of the two proceedings for treble damages. Nevertheless, it held that the question of whether Munsingwear had violated the regulation had been "distinctly put in issue and directly determined" (178 F. 2d 208) in the injunction proceeding and that the question could not again be litigated between the same parties.

The only question presented in the injunction suit was the question of whether Munsingwear had violated the price regulation. Similarly, in this case, the only question is whether the Ri-Co label does or does not violate the requirements of the Act.

that case will become *res judicata*. In either event, the question of the sufficiency of the directions for use contained on Alberty's labels would then be decided on its merits.

THE MERITS OF THE APPEAL.

On the merits of the appeal, the brief for the Government is significant not so much in what it says as in what it does not say. The brief makes no mention of the regulation which the Food and Drug Administration issued before it embarked upon its present course of attempting to force the manufacturer of a drug to state the conditions for which a drug is used as part of the directions for the use of that drug.

We have demonstrated in our opening brief that the regulation itself makes a distinction between "directions for use" and "conditions" and that the former was thus clearly intended not to include the latter. The Government makes no answer to that argument. It does not even state, as it did in the District Court, that it does not wish to rely upon the regulation. Alberty does wish to rely thereon. It was promulgated by the Food and Drug Administration as *its* construction of Sec. 352(f)(1) and makes it clear that, at one time at least, the Food and Drug Administration itself recognized that, under the powers given it by the Act, it could not impose upon drug manufacturers the requirement that it now seeks to impose upon Alberty.

It has of course long been settled that the construction of a statute by the administrative agency charged with its enforcement is entitled to the highest respect and will usually not be disturbed by the Courts. *Sanford's Estate v. Commissioner of Internal Revenue,* 308 U.S. 39, 84 L. Ed. 20, and cases cited in annotation in 84 L. Ed. 28. That rule works both ways and the administrative construction of a statute binds the Government as much when it does not favor the Government's position as when it does.

Colgrove v. United States (C.A. 9, 1949), 176 F. (2d) 614, is not in point. This Court sustained a conviction of criminal contempt for violation of an injunction to which Colgrove had consented and from which no appeal had been taken. This Court accordingly did not have to decide and did not decide whether the labeling which the injunction enjoined Colgrove from using contained adequate directions for use.

The Government also relies upon *United States v. 150 Pkgs., etc.* (U.S.D.C., E.D. Mo., 1947), 83 F. Supp. 875, a case which gives no reason in support of its conclusions, and upon *United States v. Various Quantities of Article of Drug* (U.S.D.C., D.C., 1949), 83 F. Supp. 882, a case which has not yet become final. The Government also cites an article published in Vol. 5 of the Food, Drug, Cosmetic Law Journal. Since its author, Mr. Kleinfeld, is head of the General Regulations Unit, Criminal Division, Department of Justice, and is in charge of litigation under the Fed-

eral Food, Drug, and Cosmetic Act, it is hardly surprising that the views expressed in that article agree with the views expressed in the brief filed by the Government. As far as this case is concerned, however, we fail to see how the position of the Government is strengthened by the fact that the man in charge of litigation agrees with the man in charge of briefs.

The Government next contends that no information could be more essential to the consumer regarding a drug which he can purchase without prescription than a statement of the conditions for which the drug is used. We agree that no one is likely to purchase a drug without knowing the conditions for which the drug is used. That knowledge, however, must be imparted to the consumer by means other than the label. He must have it before he gets close enough to the label to be able to read its fine print. In other words, he will not buy the drug unless he learns of the conditions for which it is used from sources outside the label, as by prescription, recommendation, suggestion, or common and effective usage. By the time he sees the label, he needs only to be protected by being told *how* to use the drug for the condition for which he is purchasing it. If "4 times daily" is an adequate direction for the use of the drug in that condition, the label complies with the Act irrespective of whether it refers to that condition.

The Government's fear that, unless its new construction of the Act be adopted, the Act cannot be enforced, is groundless. We have already shown in our

opening brief that the Government is armed with all the weapons it needs for such enforcement. In any case, new weapons are manufactured by the Congress.

The Government's contention that, unless its new construction is adopted, paragraphs (a) and (j) of Section 352 are reduced to a nullity, is similarly groundless.

United States v. Dotterweich, 320 U.S. 277, and *United States v. Antikamnia Chemical Company,* 231 U.S. 654, upon which the Government relies, have nothing to do with the question now before this Court. This case is one of first impression as far as an Appellate Court is concerned and no amount of out-of-context quotations from Supreme Court decisions will make it otherwise.

To summarize: The directions printed on the label of Ri-Co Tablets are adequate for their use in all conditions for which they are prescribed, recommended, suggested, or commonly and effectively used. The Act does not require a label to include a statement of those conditions and the decree should accordingly be reversed with instructions to dismiss the libel. In the alternative, the decree should be reversed, and the question of whether the directions are adequate for the intelligent and effective use of the tablets should be left to the determination of a jury. If the case cannot be decided on its merits, the District Court should be directed to dismiss it or, in the alternative, this Court should dismiss the appeal with

an order making it clear that the decree of the District Court will not be *res judicata*.

Dated, San Francisco, California,
August 11, 1950.

Respectfully submitted,
GEORGE H. HAUERKEN,
HAUERKEN & ST. CLAIR,
Proctors for Appellant.

No. 12484

United States
Court of Appeals
for the Ninth Circuit.

AMERICAN AUTOMOBILE INSURANCE COMPANY and AMERICAN AUTOMOBILE FIRE INSURANCE COMPANY,

Appellants.

vs.

AMERICAN AUTO CLUB,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Southern District of California,
Central Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

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707 S. Hill St.,
Los Angeles 14, Calif.

For Appellee:

BRONSON, BRONSON & McKINNON,

1500 Mills Tower,
San Francisco, Calif.

In the District Court of the United States, Southern District of California, Central Division.

No. 8032-B

AMERICAN AUTOMOBILE INSURANCE COMPANY, a corporation, and AMERICAN AUTOMOBILE FIRE INSURANCE COMPANY, a corporation,

Plaintiffs,

vs.

AMERICAN AUTO CLUB, a corporation, JOHN DOE ONE TO TEN, JANE DOE ONE TO TEN AND DOE CORPORATION ONE TO TEN,

Defendants.

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

Come Now the plaintiffs and complaining of defendants, and each of them, allege:

I.

That at all times herein mentioned plaintiffs have been and now are corporations duly incorporated, organized and existing under the laws of the State of Missouri and authorized to do business in the State of California; that the defendant, doing business under the name and style of American Auto Club, is a corporation incorporated under the laws of the State of California and a citizen and resident of the State of California.

II.

That this is a suit between citizens of different states [2*] and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum of $3000.00.

III.

Defendants John Doe I, Jane Doe I and Doe Corporation are sued herein under fictitious names, their true names being unknown to plaintiffs, and when said true names are discovered plaintiffs will ask permission of the court to amend their complaint by inserting them herein; that plaintiffs are informed and believe and therefore allege that said defendants are in some way responsible for the conduct of the business of the defendant corporation.

IV.

That defendant American Auto Club was incorporated and organized under the laws of the State of California on March 6, 1947; that the name of said corporation was changed to American Auto Club on July 8, 1947, by a certificate of amendment filed by the incorporators thereof; that since said time defendants have been doing business in the State of California under said style and name.

V.

That plaintiffs were organized in the State of Missouri in the year 1911 for the purpose of engaging in and conducting the business of automobile insurance and in 1927 they further organized for

* **Page numbering appearing at bottom of page of original Transcript of Record.**

the purpose of conducting a fire insurance business, and for more than thirty-seven years the plaintiffs have been so engaged in operating and conducting automobile insurance or fire insurance businesses, employing a large number of salesmen and representatives and soliciting and selling said insurance to the public in the State of California and throughout the United States and in foreign countries.

VI.

That in conducting said insurance businesses for the said period of thirty-seven years plaintiffs have expended and invested large sums of money for the improvement and enlargement of their [3] companies and for the betterment of their services and good will to their clients and the purchasing public; that as a result of said expenditures and effort on the part of plaintiffs' companies they have acquired and earned a large volume of insurance business as well as a valuable reputation and regard among clients, brokers and trade journals for a high quality of service, financial responsibility and fair dealing; and that as a direct result of the aforesaid services and reputation, plaintiffs' business and good will are worth several millions of dollars, the exact amount of which is not presently ascertainable.

VII.

Soon after the organization of the plaintiff corporations, their clients, persons engaged in the insurance business, and the buying public, as well as

trade journals, newspapers and magazines of general circulation, shortened the name of the plaintiffs to "American Auto" so that by reason of the character and quality of services rendered plaintiffs have become widely, commonly and publicly known and accepted in the State of California and throughout the United States as "American Auto"; that the name "American Auto" is and has been invariably used by the plaintiffs' salesmen as indicating the concern with which the public was dealing and persons engaged in the insurance business generally have accepted and known plaintiffs by that name.

IX.

That plaintiffs learned for the first time of the existence of the defendant corporation on or about September 10, 1947, and of the fact that they proposed to enter the automobile insurance business and to sell, under the names of American Auto Club and "American Auto," various types of automobile insurance policies of the variety and type sold by plaintiffs, and that they now contemplate further expansion of said automobile insurance business, all in disregard of the rights of plaintiffs; that promptly thereafter, [4] on September 15, 1947, plaintiffs, through their attorneys of record herein, mailed to said defendant a letter in which the plaintiffs protested the use of said name in conducting said insurance business and requested that defendants discontinue the use of said name. No reply to said letter was ever received and in spite

of the protest, so made as aforesaid, defendants have used, are using and, unless restrained by order of this court, will continue to use said name in conducting their insurance business, to the injury and damage of plaintiffs; that plaintiffs have appealed to the Commissioner of Corporations and to the Insurance Commissioner of the State of California but have been advised that they no longer have jurisdiction or discretion in the matter of approving or denying the use of said name by defendants.

X.

That the defendants, if not restrained by order of this court, will inevitably become known as "American Auto" and they will permit and allow their salesmen and representatives to go out among the public and particularly the large number of plaintiffs' customers, representing that they are employed by the "American Auto" and soliciting business for the defendant with words, actions and conduct calculated to deceive said public and said plaintiffs' customers into believing that they are dealing with plaintiffs' companies; that the inevitable result has been and will be that the defendant and its representatives, in using the name "American Auto" in the conduct of said competitive insurance business will create a confusion in the minds of the public and plaintiffs' customers and result in a diversion of sales and good will from plaintiffs; that the valuable patronage which is an increment of plaintiffs' reputation will be lost and further-

more, if the services rendered by said defendant do not measure up to the standard which persons in the insurance business and the general public have come to expect of the plaintiffs, this fact will lower the reputation, standing [5] and prestige of the plaintiffs, all to their irreparable loss, injury and damage.

XI.

That plaintiffs have no speedy nor adequate remedy at law and the extent of the damage they will suffer in their sales, good will and reputation cannot be adequately or at all compensated in damages.

Wherefore, plaintiffs pray judgment that:

1. Defendants, and each of them, and all of their agents, servants and employees be restrained from including or using in any name under which they, or any of them, might do business or in any advertising or publicizing which they or any of them do or cause to be done or hereafter do or cause to be done in connection with their said business or any part thereof, the words "American Auto" or any colorable imitation thereof or any group or combination of words in effect the same as or colorably similar to "American Auto" and from using the name "The American Auto Club" or any colorable imitation thereof in connection with their said business.

2. Defendants and each of them and all of their agents, servants and employees be restrained from selling or soliciting insurance policies, and from in any way participating in the insurance business under or in connection with the name "American Auto Club" or any name including the words "American Auto" or any colorable imitation thereof.

3. An order be issued requiring the defendants to appear at a time and place to be fixed by this court requiring defendants to attend and show cause why a temporary injunction should not issue restraining them in accordance with sub-division I of this prayer. [6]

4. A temporary injunction be issued pending the trial of this action and that a permanent injunction be issued restraining defendants in accordance with sub-divisions 1 and 2 of this prayer.

5. Plaintiff have its costs incurred herein.

6. Such other and further relief be awarded as may be meet and proper in the premises.

PARKE, STANBURY &
REESE,
By /s/ RAYMOND G. STANBURY,
Attorneys for Plaintiffs.

State of California,
County of Los Angeles—ss.

Don R. Sessions being first duly sworn, deposes

and says: that he is the Vice-President for American Automobile Insurance Company, a corporation and as such makes this affidavit for and on behalf of said corporation, plaintiff in the above entitled action; that he has read the foregoing Amended complaint for Injunctive Relief and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Subscribed and sworn to before me this 1st day of December, 1948.

/s/ DON R. SESSIONS.

[Seal] /s/ MARY O. TERPENNING,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed December 15, 1948. [8]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Defendant American Auto Club, a corporation, answering plaintiffs' amended complaint on file herein, admits, denies and alleges:

I.

This court is without jurisdiction of the subject matter of said amended complaint.

II.

Plaintiffs' amended complaint fails to state a claim upon which relief can be granted.

III.

Answering paragraph I of plaintiffs' amended complaint, defendant American Auto Club states that it has no information or belief on the subject of any allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground, denies generally and specifically each and every, all and singular, said allegations.

IV.

Answering paragraph II, this defendant denies that there is any amount in controversy herein or that the amount in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000.00.

Further answering said paragraph II, this defendant states that it has no information or belief upon the subject of the remaining allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground, denies generally and specifically each and every, all and singular, said allegations.

V.

Answering paragraph III, this defendant states that it has no information or belief upon the subject of the allegations [10] thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground denies generally and spe-

cifically each and every, all and singular, said allegations.

VI.

Answering paragraph V, this defendant states that it has no information or belief upon the subject of the allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground, denies generally and specifically each and every, all and singular, said allegations.

VII.

Answering paragraph VI, this defendant states that it has no information or belief upon the subject of the allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground, denies generally and specifically each and every, all and singular, said allegations.

VIII.

Answering paragraph VII, this defendant states that it has no information or belief upon the subject of the allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground, denies generally and specifically each and every, all and singular, said allegations.

IX.

Answering paragraph IX, this defendant admits that on or about September 15, 1947, plaintiffs mailed defendant the letter therein referred to, to which defendant made no reply.

information or belief, and as to those matters he believes it to be true.

/s/ WALTER MULLER.

Subscribed and sworn to before me this 6th day of December, 1948:

[Seal] /s/ PAULINE GREEN,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Oct. 3, 1952.

Receipt of copy attached.

[Endorsed]: Filed December 22, 1948. [13]

[Title of District Court and Cause.]

PLAINTIFFS' EXCEPTIONS TO PROPOSED (LOCAL RULE 7(a))

Plaintiffs respectfully submit the following objections to the proposed findings of fact.

I.

Add to the end of paragraph IV, at page 3, line 3:

"and to that section of the public holding policies with plaintiffs or with whom plaintiffs have adjusted claims."

II.

Plaintiffs object to that portion of paragraph VI commencing with the word "Since" and ending

with the word "Auto," page 4, lines 1 to 3 because the evidence shows without dispute that plaintiffs have not abandoned the name "American Auto" and that, among other things they are listed as such or as "American Automobile" in telephone directories throughout the United States. [15]

III.

Add to paragraph VII page 4, line 9, following the word "companies" the following:

> "This is a temporary condition; plaintiffs still write automobile insurance extensively but because, at the present time, it is not profitable plaintiffs have made no effort to expand that branch of their business."

IV.

Object to paragraph VIII page 4, for the reason that it is self-evident that the words "American Auto" are unique and because the evidence shows that they apply to no insurance company or concern other than these plaintiffs.

V.

Object to paragraph IX, page 4, that portion thereof commencing with the word "Neither" at line 14 and ending with the word "clientele" at line 18, for the reason that it is self-evident that plaintiffs sell to the public, although through agents and brokers, as members of the public comprise

plaintiffs' clientele. Plaintiffs propose the following in lieu thereof:

> "Plaintiffs solicit automobile insurance business from, and sell the same to members of the public, through independent insurance brokers and agents who, in the main, have their own clientele."

VI.

Add to paragraph X, following the word "name" at page 5, line 6, the following:

> "Plaintiffs, at all material times, have had outstanding from their Los Angeles office some forty thousand to fifty thousand [16] policies of insurance; plaintiffs, in the course of their business, have occasion to settle claims with large numbers of persons, said number having been approximately twenty-four thousand persons in the year 1947; that plaintiffs are commonly known to such persons, dealing with plaintiffs as claimants or policy holders, as "American Auto" or "American Automobile."

The reason for this objection and proposed amendment is that it is obvious that plaintiffs' dealings are not confined to brokers and agents. The undisputed facts prove that plaintiffs deal with and are known to many thousands of persons who are not brokers or agents and with whom their reputation and name has significance and value.

VII.

Plaintiffs object to the whole of paragraph XI, page 5, for the reason that the statement that plaintiffs are not known to the public as "American Auto" is untrue, the undisputed evidence being that no insurance concern other than these plaintiffs is known as "American Auto" and it being undisputed that a large segment of the public, if assumed to be composed of no others than claimants and policy holders, so know these plaintiffs. Further the statement that the name "American Auto" has not acquired a secondary meaning is untrue, according to all the evidence. Plaintiffs request that the following be substituted in lieu thereof:

> "Plaintiffs and each of them is known to a large segment of the public, including many thousands of policy holders and claimants, as "American Auto"; that no other concern dealing in any way with insurance [17] or automobile service in the United States is, or has at any material time, been known as "American Auto" or "American Automobile"; that said words "American Auto" have thereby acquired a secondary meaning referring to plaintiffs."

VIII.

Plaintiffs object to the whole of paragraph XV, pp. 5 to 6 in that said finding, in declaring that defendant will not engage in the business of selling insurance, is untrue; the undisputed evidence is that the defendant is authorized by its Articles of In-

corporation to sell insurance; that it has introduced into evidence a circular informing its proposed members that it will provide assistance in obtaining insurance; that its President testified that the said defendant will aid its members by referring them to insurance brokers and agents; that the organizers and proprietors of the defendant are now insurance brokers; plaintiffs propose the following in lieu thereof:

> "Defendant is authorized by its Articles of Incorporation to sell automobile insurance; that defendant proposes to assist its members by referring them to insurance agents and brokers for the purpose of having automobile insurance written for such members."

IX.

Plaintiffs request that the following finding be added:

> "That the defendant has not thus far commenced to operate; that it has no members, no office and no organization; that it has withheld the commencement of its operations until after the determination of this [18] litigation."

X.

Plaintiffs request that the following finding also be added:

> "that defendant intends to provide its members with emblems prominently displaying the words "American Auto Club," to be carried

on their automobiles; that the effect of such emblems upon persons who know plaintiffs as "American Auto" may cause such persons to believe that there is an identity or association of proprietorship between plaintiffs and defendant."

CONCLUSION

The foregoing objections are not intended to constitute an acquiescence by plaintiffs in those findings which are not objected to. Plaintiffs intend to move for a new trial and if the same is denied to appeal from the judgment. Since the Court has found in favor of the defendant it has been assumed, in presenting these objections, that basic findings in favor of the defendant will be made and therefore the same have not been expressly objected to above. Most of the foregoing objections do not conflict with the basic findings of the Court but do, we respectfully submit, comply with undisputed evidence.

Insofar as any of the foregoing objections are allowed, counsel for plaintiffs are willing to cause the findings to be retyped as finally approved.

Respectfully submitted,

PARKER, STANBURY &
REESE,

By /s/ RAYMOND G. STANBURY,
Attorneys for plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 27, 1949. [19]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was submitted upon the pleadings, evidence, exhibits and arguments of counsel for plaintiffs and of counsel for defendant, and, after due consideration, the Court, being fully advised in the premises, enters its findings of fact and conclusions of law, as follows:

Findings of Fact

I.

Plaintiffs at all times herein mentioned have been and now are corporations duly incorporated, organized and existing under the laws of the State of Missouri and each is authorized to do business in the State of California.

Defendant, American Auto Club, is a corporation duly [21] incorporated, organized and existing under the laws of the State of California, and is a citizen and resident of the State of California.

II.

This is a suit between citizens of different states and the amount in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000.00.

III.

Defendant was incorporated and organized under the laws of the State of California on March 6,

1947, under the name "Auto Club of Hollywood." The name of said corporation was changed to "American Auto Club" on July 8, 1947, by a certificate of amendment duly filed by its incorporators. Since said time, defendant has been licensed and qualified to transact the business of a motor club in the State of California under said style and name.

IV.

Plaintiff, American Automobile Insurance Company, was organized in the State of Missouri in the year 1911 for the purpose of engaging in and conducting the business of automobile insurance. In 1927, said plaintiff caused American Automobile Fire Insurance Company to be organized for the purpose of writing certain types of automobile insurance, including fire. Since said respective dates, plaintiffs have engaged in operating and conducting automobile insurance and automobile fire insurance businesses. In about the year 1943 plaintiffs purchased Associated Indemnity Corporation, an insurance corporation, and Associated Fire and Marine Insurance Company, an insurance corporation. Plaintiff and these two last named insurance companies have completely or substantially a common ownership. The business of each is conducted from the same location. Plaintiffs have qualified to transact an insurance business, [22] and conduct substantial business, in all of the States of the United States, and are reputable and well regarded by other persons, firms and corporations engaged in the insurance business.

V.

Prior to 1944 plaintiffs advertised in trade journals under the complete corporate name of each of them and in some instances under the name "American Auto." Such trade journals were designed and intended to and did circulate among persons engaged in the insurance business and were not intended or designed to and did not reach or circulate among the public generally. Prior to 1944 letter-size folders were prepared by plaintiffs and made available and distributed to insurance brokers and agents for the purpose of being distributed by the latter to their clients, which folders contained some reference to plaintiffs by the name "American Auto." These folders were not widely distributed among the public by said brokers or agents nor were they distributed to any substantial extent whatsoever. Except for isolated instances occurring approximately ten years ago, plaintiffs have never at any time advertised and do not now advertise through any medium of general circulation among the public or in any manner calculated or designed to or which does reach the public generally under the name "American Auto" or otherwise.

VI.

Since 1944 plaintiffs have advertised in such trade journals as described above under the name "American Associated," or "American Associated Insurance Companies"; and when plaintiffs' names do appear in such advertising each is spelled out in

full. Since 1944 there has been an effort on the part of plaintiffs to have their companies known as "American Associated" or "American Associated Insurance Companies" and the evidence shows and the Court hereby finds that plaintiffs desire and are making an effort to be known as "American Associated" and "American Associated Insurance Companies" rather than "American [23] Auto." Since 1944 neither of plaintiffs has made an attempt nor indicated any desire to become known as or to identify themselves or either of them with the name "American Auto."

VII.

Since 1944 plaintiffs have made no attempt to expand their automobile insurance business but rather have endeavored to limit it, and since said date are and have been primarily devoting their efforts to the development and expansion of other types of insurance issued by their "associated" companies.

VIII.

The words "American Auto" are not unique either individually or in combination.

IX.

Neither of plaintiffs solicit automobile insurance business from, or sell the same directly to members of the public. The business of plaintiffs and each of them is conducted through independent insurance brokers and agents who have their own clientele. In substantially every case the client or customer of

said broker or agent does not specify any particular insurance company which he wishes to issue the policy he is purchasing. In the overwhelming percentage of cases such brokers or agents themselves select the company in which any given policy of insurance is placed.

X.

Plaintiffs are known to some insurance brokers and agents as "American Auto" but such brokers and agents are also familiar with and know the true and full names of plaintiffs and each of them and are familiar with and know the organization, entities and places of business of plaintiffs and each of them. Such brokers and agents are insurance experts and are especially educated and well informed within the field of insurance and are well aware of the identities of the insurance firms with which [24] they deal and with whom they place their business. No confusion will result among such brokers and agents from the use by defendant of its corporate name, to wit: "American Auto Club." Such brokers and agents will not confuse the identities of plaintiffs or either of them and defendant in the event that defendant is permitted to and does use its said corporate name.

XI.

Plaintiffs are not and neither of them is known to the public as "American Auto" and the name "American Auto" is not understood to be nor is it identified with plaintiffs or either of them widely,

commonly, publicly or generally; and neither the name "American Auto" nor either of the words thereof has acquired a secondary meaning.

XII.

There is and has been no intent on the part of defendant to capitalize upon, or in any way take advantage of any similarity which exists between its said corporate name and the names of plaintiffs or either of them and there is and has been no intent on the part of defendant to compete unfairly in any manner with plaintiffs or either of them by virtue of any such similarity which might exist. Defendant selected its name honestly and in good faith. Defendant's use of its name "American Auto Club" has been permitted both by the Secretary of State and the Insurance Commissioner of the State of California.

XIII.

Defendant is not doing and does not intend to do business under the name "American Auto" or any name other than "American Auto Club."

XIV.

Neither of plaintiffs will be injured or damaged by reason of the use by defendant of its said corporate name.

XV.

Defendant is not doing an [25] insurance business in the State of California or in any state, and is not engaged and its purpose is not to engage in the

business of selling insurance, although to do so is within its corporate powers. One of defendant's purposes is to aid its members by referring them to insurance agents and brokers for the purpose of obtaining automobile insurance.

Conclusions of Law

1. This Court has jurisdiction of the parties and of the subject matter of this action.

2. No secondary meaning exists, has attached to or developed in connection with the name or words "American Auto" or either thereof.

3. Plaintiffs have no ownership of or property interest in or right to the name or words "American Auto" or either thereof sufficient to enable it to preclude, or object to the use thereof by other persons or firms.

4. Defendant has not competed and will not compete unfairly with plaintiffs or either of them by any use of the name or words "American Auto Club" or "American Auto" and has not competed and will not compete unfairly by representing itself as being, or as being affiliated or connected with plaintiffs or either of them.

5. Defendant has the right to use the name or words "American Auto Club" in carrying on its business.

6. Plaintiffs are not entitled to the injunction prayed for or to any relief whatsoever.

7. Defendant is entitled to judgment in its favor, and to recover its cost of suit incurred herein.

A decree may be entered accordingly.

Dated: December 15, 1949.

/s/ C. E. BEAUMONT,
U. S. District Judge.

[Endorsed]: Filed December 15, 1949. [26]

In the District Court of the United States for the Southern District of California—Central Division

No. 8032-B

AMERICAN AUTOMOBILE INSURANCE COMPANY, a corporation, and AMERICAN AUTOMOBILE FIRE INSURANCE COMPANY, a corporation,

Plaintiffs,

vs.

AMERICAN AUTO CLUB, a corporation, JOHN DOE ONE TO TEN, JANE DOE ONE TO TEN and DOE CORPORATION ONE TO TEN,

Defendants.

JUDGMENT

The above entitled cause having come on regularly for trial in the above entitled Court on the 4th, 5th, 6th and 7th days of January, 1949, before the

Honorable Campbell E. Beaumont, Judge presiding, plaintiffs appearing by their counsel, Messrs. Parker, Stanbury & Reese, and defendant American Auto Club, a corporation, appearing by its counsel, Messrs. Bronson, Bronson & McKinnon, and evidence, both oral and documentary, having been submitted to the Court, and the Court, being duly advised, having ordered judgment for defendant American Auto Club, a corporation, and having filed herein its findings of fact and conclusions of law in writing, [27]

Now, Therefore, by reason of the premises and of the findings of fact and conclusions of law aforesaid,

It Is Ordered, Adjudged and Decreed:

1. That plaintiffs, American Automobile Insurance Company, a corporation, and American Automobile Fire Insurance Company, a corporation, take nothing by their action and that the same be and it is hereby dismissed with prejudice; and that judgment be and it is hereby ordered and made in favor of defendant American Auto Club, a corporation, and against plaintiffs American Automobile Insurance Company, a corporation, and American Automobile Fire Insurance Company, a corporation, and each of them.

2. That defendant American Auto Club, a corporation, do have and recover of and from plaintiffs

its costs herein incurred, hereby taxed in the sum of $65.70.

Dated: December 15, 1949.

/s/ C. E. BEAUMONT,
Judge of the U. S. District Court.

Lodged November 28, 1949.

[Endorsed]: Filed and entered December 15, 1949. [28]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiffs American Automobile Insurance Company, a corporation, and American Automobile Fire Insurance Company, a corporation, and each of them, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that said judgment and the whole thereof entered in favor of defendants and against plaintiffs in this action on the 15th day of December, 1949, in Judgment Book No. 62, at page 568.

Dated: January 14, 1950.

PARKER, STANBURY & REESE,
By /s/ RAYMOND G. STANBURY,
Attorneys for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 14, 1950. [29]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That American Automobile Insurance Company, a corporation organized and existing under the laws of the State of Missouri and duly qualified for the purpose of making, guaranteeing or becoming Surety on bonds or undertakings required or authorized by the laws of the United States of America, as Surety, is held and firmly bound unto American Auto Club, a Corporation et al, Defendants and Respondents, in the penal sum of Two Hundred Fifty and no/100 Dollars ($250.00), to be paid to said American Auto Club, a Corporation et al, Defendants and Respondents, their heirs and assigns, for which payment well and truly to be made the American Automobile Insurance Company binds itself, its successors and assigns, firmly by these presents.

Signed, Sealed and Dated this 13th day of January, 1950.

The Condition of the Above Obligation Is Such,

That Whereas, the American Automobile Insurance Company, a Corporation and American Automobile Fire Insurance Company, a Corporation, plaintiffs and Appellants in the above entitled suit, are about to take an appeal to the United States Court of Appeals, Ninth Circuit, to reverse a judgment made, rendered and entered on the 15th day of December, 1949, by the District Court of the

United States, for the Southern District of California, Central Division, in the above entitled cause granting judgment thereon in favor of the Defendants and Respondents as in said judgment set forth.

Now, Therefore, the condition of the above obligation is such that if the American Automobile Insurance Company, a Corporation, and American Automobile Fire Insurance Company, a Corporation, Plaintiffs and Appellants, shall prosecute their said appeal to effect and answer to all costs which may be adjudged them if they fail to make good their appeal, then this obligation shall be void; otherwise to remain in full force and effect.

[Seal] AMERICAN AUTOMOBILE INSURANCE COMPANY,

By/s/ H. S. VREELAND,
Attorney-in-Fact.

Bond No. S. 4607005. [31]

State of California,
County of Los Angeles—ss.

On this 13th day of January in the year one thousand nine hundred and fifty before me, Enid N. Davis, a Notary Public in and for said Los Angeles County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared H. S. Vreeland known to me to be the Attorney in Fact of the American Automobile Insurance Company, the corporation described in and that executed the within and foregoing instrument, and known to me

to be the person who executed the said instrument on behalf of the said corporation, and he duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County of Los Angeles, the day and year in this certificate first above written.

[Seal] /s/ ENID N. DAVIS,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires June 13, 1951.

[Endorsed]: Filed January 14, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Plaintiffs herein having lately filed their notice of appeal from the judgment of this Court to the Circuit Court of Appeals for the Ninth Circuit Court, hereby designate the following portions of the record and proceedings in this case, which is the complete record, to be contained in the Record on Appeal.

1. Amended complaint for injunctive relief.
2. Answer to amended complaint.
3. Findings of fact and conclusions of law.

4. Plaintiffs' exceptions to proposed findings.

5. Judgment.

6. All exhibits received in evidence.

7. Complete transcript of testimony and proceedings, a copy of which (the original) is filed herewith. [32]

8. Notice of appeal to the Circuit Court of Appeals.

9. Cost bond on appeal.

10. Designation of contents of Record on Appeal.

11. Docket entries.

PARKER, STANBURY & REESE,

By /s/ RAYMOND G. STANBURY,

Attorneys for Plaintiffs, American Automobile Insurance Company and American Automobile Fire Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 1, 1950. [33]

[Title of District Court and Cause.]

DOCKET ENTRIES

1948

Mar. 8—Fld complt for injunctive relief. Issd sum. Made JS-5 Report.

Mar. 15—Fld sum ret serv.

Apr. 1—Fld stip and ord that defts hv to & includg 4/19/48 to answer only.

Apr. 20—Fld Answer deft.

June 7—Ent ord setting for trial 10/19/48, 10 AM. "B" cal.

Oct. 7—Ent Ord placing cause on cal 10/11/48 10 AM for resetting and notified counsel.

Oct. 11—Ent ord resetting cause for tr on 12/1/48 10 a.m.

Nov. 24—Fld plf's no of mo retble 12/1/48 to amend compl.

Nov. 29—Fld affids R G Stanbury & Don R Sessions.

Dec. 1—Ent ord cont to 12/9/48 10 a.m. for trial or fur proceedings. Couns notif.

Dec. 3—Ent ord cont fr 12/9/48 to 12/15/48 10 a m for hrg or trial.

Dec. 11—Fld no mo dft to amend answ, ret December 15, 1948, 10 a m.

Dec. 14—Fld depos of Don R Sessions tkn 10/9/48.

Dec. 15—Ent proc & ord granting motions to amend purs stip. Fld amended compl. Ent ord cont to 1/4/49 10 a m for trial.

Dec. 22—Fld dft's answer to amended compl. Fld dft's amended answer to compl.

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Jan. 4—Ent proc trial. Fld plfs Exhs 1-8 incl & defts Exhs A-E incl. Ent ord cont to 1/5/49 9:30 AM for trial. (B)

Jan. 5—Ent proc fur trial. Fld plf's exhs 10-14-incl & deft's exhs I, J, K, M, N & mkd deft's exhs F, G, H, L. Ent ord cont to 1/6/49 2 PM for fur trial (argument).

Jan. 6—Ent proc trial. Fld deft's Exh O. Ent ord cont to 1/7/49 10 AM for fur trial (fur argument).

Jan. 7—Ent proc fur trial & ord denying relief prayed for by plf & drctg attys for deft prepare findings & judgmnt in favor deft. (B)

Jan. 27—Fld pltfs exceptions to proposed findgs fact.

Feb. 15—Fld pltfs memo of pts & auths.

Feb. 24—Lodged defts proposed findgs of fact & concls of law. Ent ord placg on cal for settlg findgs at 3/7/49, 3 PM.

Mar. 7—Ent ord cont to 3/28/49, 10 AM for settg settlmnt of findgs.

Mar. 28—Ent ord cont to 3/29/49 2 pm for settlmnt of findings.

Mar. 29—Ent proc & ord deferring settlmnt of findings pending flg of rptrs trans.

Apr. 18—Fld reptrs transc prcdgs (partial) 1/7/49.

June 29—Fld ord on stip plfs ex 1 may be withdrawn & photostatic copy subst, orig ex to be retd to file prior to time of appeal.

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Aug. 2—Fld reptrs transc prcdgs 1/4, 1/5, 1/6 & 1/7/49.

Nov. 28—Fld stip waiving fur hrg on plf's excepts to proposed findings. Lodged proposed judgmt.

Dec. 15—Fld finds fact & concls law. Fld & ent JBK 62/568 judgmt favor deft American Auto Club against plf & for defts costs, and dismiss with prej. Dktd. Not attys. Made JS 6.

Dec. 21—Fld defts memo costs & disbrsmts.

Dec. 23—Fld notice of intention of plfs to move for new trial.

Dec. 31—Fld defts notice of taxation of costs with affid advce by mail.

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Jan. 11—Taxed costs favor deft at $65.70. Dock & ent costs.

Jan. 14—Fld plfs notice of appeal. Fld cost bond on appeal, $250.

Feb. 1—Fld pltfs design of contents of rec on appeal. Fld reporters transc prodgs 1/4, 1/5, 1/6, & 1/7/49.

In the District Court of the United States for the Southern District of California, Central Division

No. 8032-B Civil

AMERICAN AUTOMOBILE INSURANCE COMPANY, a corporation, and AMERICAN AUTOMOBILE FIRE INSURANCE COMPANY, a corporation,

Plaintiffs,

vs.

AMERICAN AUTO CLUB, a corporation, JOHN DOE ONE TO TEN, et al.,

Defendants.

Honorable Campbell E. Beaumont, Judge presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, January 4, 1949

Appearances

For the Plaintiffs:
PARKER, STANBURY & REESE, By RAYMOND G. STANBURY, ESQ.

For the Defendants:
BRONSON, BRONSON & McKINNON, By FREDERICK A. POTRUCH, ESQ., and EDGAR H. ROWE, ESQ. [1*]

* * *

* Page numbering stamped at top of page of original Reporter's Transcript.

WALTER MULLER

called as a witness under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Stanbury:

Q. Mr. Muller, you are the president of the defendant company, American Auto Club, are you not, sir? A. Yes, sir. [3]

Mr. Stanbury: Counsel very kindly furnished me with copies of the Articles of Incorporation of that company and also a Prospectus which it proposes to use, and I assume we may accept these as accurate copies of those on file?

Mr. Rowe: Those are accurate copies of the originals on file.

Mr. Stanbury: If the court please, this is the only copy that counsel have. I am not anxious to introduce them in evidence if we may read pertinent portions therefrom.

The Court: That is very satisfactory to the court.

Mr. Stanbury: All right. From the Articles of Incorporation of the defendant company, under its powers the purposes for which this corporation is formed are:

"(a) To act as insurance agents and brokers in obtaining, selling and writing insurance of all kinds,

(Testimony of Walter Muller.)

including liability insurance and automobile insurance.

"(b) To act as agents, attorneys in fact, brokers, adjusters for individuals, firms, associations or corporations and particularly those owning, operating, using and maintaining motor vehicles."

Then skipping down to (d) and reading only part of it:

"To furnish, in connection with the ownership, operation, use or maintenance of motor vehicles [4] any or all of the following types of motor service as defined in the Insurance Code of California:"

I am skipping several.

"* * * claim adjustment, license and insurance services."

Then in the proposed Prospectus of this company, upon the face of which is an application for membership, on the back among other things is the following:

"Insurance Service. The club will assist members in obtaining through a qualified agent or broker insurance covering liability of or loss by such member resulting from injury or damage to personal property arising out of an accident involving the ownership, maintenance, operation or use of a motor vehicle."

Q. (By Mr. Stanbury): Now, Mr. Muller, your company was first organized as the Auto Club of Hollywood, was it not? A. Yes, sir.

Q. Now, it never did business under that name, did it? A. No, sir.

(Testimony of Walter Muller.)

Q. But an amendment was later filed in the present name, namely, American Auto Club, was it not? A. Yes, sir. [5]

Q. This company, American Auto Club, has not as yet transacted business of any kind, has it?

A. No, sir.

Q. You were organized sometime in the summer of 1947, were you not? A. Yes, sir.

Q. And in September of 1947, and, namely, on September 15th, it is admitted that you received a protest from these plaintiff companies concerning the use of this name; that is correct, is it not?

A. Yes, sir.

Q. And you have deferred commencing business under the name American Auto Club pending the outcome of this law suit, have you not, sir?

A. Yes, sir.

Q. As of this date you have not had any of your final printing done of any forms or papers of any kind, have you?

A. Only the application for members.

Q. How many of those have you had printed?

A. Several copies.

Q. You mean just a few copies for reference?

A. Yes, sir.

Q. You haven't had as many as a hundred printed, have you? A. No, sir. [6]

Q. And you haven't had any emblems made yet, have you?

A. We have had designs for emblems made.

Q. But you haven't manufactured any?

(Testimony of Walter Muller.)

A. No, sir.

Q. And you have no telephone listing as yet, have you? A. No, sir.

Q. You have no arrangement with any insurance company as yet for whom or which you intend to broker or act as agent in the sale of insurance, have you? A. No, sir.

Q. You have done no advertising yet, have you?

A. No, sir.

Q. In other words, other than being in the planning stage you haven't commenced operations of any kind at all in this name American Auto Club yet, have you?

A. Only in the preparation of the organization and outlining a plan for establishing the club.

Q. Everything you have done so far, aside from the presence on your proposed emblems and application forms of this word "American Auto Club," would apply if you took another name tomorrow, would it not? A. Yes, sir.

Q. That is, you could swing right into your operations under another name if there were one satisfactory to you? [7] A. Yes, sir.

Q. As an automobile club if you are authorized to do business under this name you intend to provide your members with emblems to be displayed on their automobiles, do you not?

A. Yes, sir.

Q. At the present time you have a design for that emblem, have you not? A. Yes, sir.

Q. What shape is that? A. It is——

(Testimony of Walter Muller.)

* * *

Q. (By Mr. Stanbury): Your counsel has just handed me this design, and I assume that that is the design which you——

A. That other one (indicating).

Q. He has handed me two, and I assume those are the two designs under consideration to be furnished to your members? A. Yes, sir.

Q. To be used on their automobiles?

A. Yes, sir.

Q. Have you decided on which one you would use? A. This one here. [8]

Q. The blue one? A. Yes.

Q. Which contains the word "American" over the top, and "Auto Club" beneath? A. Yes.

Q. And a spreading eagle and a shield in the center? A. Yes, sir.

Mr. Stanbury: Is there any objection to this being offered in evidence?

Mr. Rowe: None at all.

Mr. Stanbury: I will offer this as Plaintiffs' first in order, your Honor.

The Court: Let it be received as Plaintiffs' Exhibit No. 1.

The Clerk: So marked.

(The document referred to was marked Plaintiffs' Exhibit 1, and was received in evidence.)

Q. (By Mr. Stanbury): Then as part of your service as an automobile club, regardless of the

(Testimony of Walter Muller.)

name under which you may operate, you intend to act as agent or broker for the issuance of automobile liability insurance and other forms of automobile insurance for your members, do you not?

A. No, sir.

Q. What insurance service are you going to render?

A. We will assist the members in every way possible [9] in obtaining proper insurance, whatever is necessary for their operation of their cars, or in any way that they ask us to assist them.

Q. You intend to make some arrangement with some insurance company, some insurance agent or some insurance broker for this purpose, do you not?

A. We intend to make an arrangement with maybe several brokers.

Q. In other words, you intend to furnish your members with a service which will put them in contact with some broker or agent through which or from whom they may obtain automobile insurance, do you not? A. Yes, sir.

Q. All lines of automobile insurance?

A. Yes, sir.

Q. Then when you operate as a club under whatever name it may be, you intend to render claims service to your members, do you not?

A. Insofar as the members, if they have an accident of any kind and they have the need for insurance, we will assist them in getting in touch with the proper adjusters in whatever company they are insured with.

(Testimony of Walter Muller.)

Q. What claims service do you intend to furnish?

A. We don't intend to give any claims service except to assist the member in getting the proper adjustment if they [10] have the need for contact with their insurance carrier.

The Court: What form will that assistance take, Mr. Muller?

The Witness: For instance, if a man had an accident, and he would call us up, we would check up with his insurance policy and then get the proper adjuster to make the necessary adjustment for his claim with the insurance company, whichever insurance company it was.

The Court: You say "make the necessary adjustment"; would you just have them contact each other?

The Witness: That's right.

The Court: Or go further?

The Witness: No. We would get the adjuster in contact with the customer so that they would make the proper adjustment there.

The Court: You say "proper adjustment"; that is rather comprehensive.

The Witness: In other words, we would assist them—we would assist the member in every way possible to help them on their insurance problems.

The Court: And the adjustments also?

The Witness: On anything pertaining to their——

The Court: Anything pertaining to automobile insurance?

(Testimony of Walter Muller.)

The Witness: Automobile, yes.

The Court: Go ahead. [11]

Q. (By Mr. Stanbury): You intend—I am referring to your deposition and not intending to put words in your mouth—you intend to render to your members whatever claim service is rendered by the Automobile Club of Southern California, do you not?

A. Ours would be a little different, because the Automobile Club of Southern California have their own insurance company and they have their own adjusters. We couldn't go that far, because we wouldn't have any insurance company of our own, we wouldn't have any insurance agency whatsoever. We would only assist our members in making the proper connection with the adjusters, because we couldn't have any adjusters of our own because we wouldn't have any insurance company.

Q. You intend to take the accident reports from your members, do you not? A. Yes, sir.

The Court: Will you read that part of the instrument from which you first read, subdivision (b), about adjusters, please, Mr. Stanbury?

Mr. Stanbury: Yes, sir.

"To act as agents, attorneys in fact, brokers, adjusters for individuals, firms, associations or corporations and particularly those owning, operating, using and maintaining [12] motor vehicles."

Under subdivision (d) is the reference to claim adjustment.

(Testimony of Walter Muller.)

Mr. Rowe: May it please the court, may I interrupt so that the record will be complete on each point?

The Court: Yes.

Mr. Rowe: I would like to call your Honor's attention at this point to the paragraph in the application from which counsel read earlier, the application for membership, which is——

The Court: You have some of those, why don't you file that?

Mr. Rowe: I would like to file one and call your Honor's attention at this point to the paragraph dealing with insurance service, with the comment that that paragraph contains a complete statement of the insurance service which this club proposes to offer to its members.

Mr. Stanbury: That is one I read, did I not?

Mr. Rowe: I think you did. May I make this a defendant's exhibit?

Mr. Stanbury: I will make it plaintiffs' next in order, if you like.

Mr. Rowe: That is all right.

The Court: Let it be received, then, as Plaintiffs' Exhibit 2. [13]

* * *

Q. (By Mr. Stanbury): Mr. Muller, in assisting your members in obtaining automobile insurance you intend to do that under an arrangement whereby the American Auto Club would obtain (a), an overriding percentage of some sort?

(Testimony of Walter Muller.)

A. No, sir.

Q. You are at the present time one of the proprietors of Muller Brothers, are you not?

A. Yes, sir.

Q. Do you intend to transfer your insurance activities from Muller Brothers to the American Auto Club? A. No. Vice versa.

Q. What do you mean by that?

A. Muller Brothers are an insurance agent at the [14] present time. Any reference of insurance would be referred to Muller Brothers.

Q. The stockholders of the American Auto Club are you and your brother? A. Yes, sir.

Q. And who else? A. My wife.

Q. All right. And the three of you are owners of the business Muller Brothers, are you not?

A. The two of us.

Q. There are two brothers? A. Yes.

Q. You and your brother are?

A. Yes, sir.

Q. At the present time you are insurance brokers, are you not?

A. We are insurance agents.

Q. Agents for some particular company?

A. Several companies.

Q. All right. In that capacity you of course receive a percentage on business written, do you not? A. Yes, sir.

Q. So that when you operate your Auto Club under whatever name you will refer your members

(Testimony of Walter Muller.)

to Muller Brothers as an insurance agent to obtain insurance with companies [15] with which Muller Brothers has an agency, is that right?

A. Muller Brothers would be one of the agents that the Auto Club—that the Automobile Club would refer to, among other agents. We will assist a member in any way that he wants to purchase insurance in whatever company he wants. We might not be an agent—Muller Brothers might not be an agent for the company he has a preference for or the company he desires to insure with.

The Court: Are Muller Brothers agents for more than one company?

The Witness: Yes, sir.

The Court: Go ahead, Mr. Stanbury?

Q. (By Mr. Stanbury): Have you changed your intentions with reference to obtaining a profit from insurance business through your Auto Club since your deposition was taken on October 8th of last year, '48? A. Not necessarily.

Q. If you will look, Mr. Muller, at your deposition, page 8, line 6, to the bottom of the page, line 26, just read it to yourself, will you, and tell me when you have finished it. A. Yes, sir.

Q. The Mr. Sessions referred to there is the Mr. Sessions who is the vice-president of the plaintiff companies, is he not? [16] A. Yes, sir.

Q. "Q. By way of illustration, when one buys insurance through the Automobile Club of Southern California they buy in the Standard Accident of

(Testimony of Walter Muller.)

Detroit, as I understand it. Do you propose to render a service to the members of the American Auto Club, if they wish it, which would refer them to some insurance company with which the American Auto Club would have some arrangement, is that right? "A. That is right.

"Q. Now, have you approached any insurance company as yet with this proposition?

"A. We had in mind approaching Mr. Sessions, if he had a good enough discount for us to operate.

"Q. Have you done that yet?

"A. No, sir.

"Q. When I say 'you' I mean the American Auto Club also.

"A. That is me, the same thing.

"Q. That is right. Have you actually approached any company with this proposition?

"A. No, sir."

I have correctly read that, have I not?

A. Yes, sir. [17]

Q. Now, at the time you gave your deposition it was your intention to approach some insurance company to see if you could get a satisfactory discount on insurance rates, was it not?

A. Well, I guess I was confused in your questions and my answers there at that time. The arrangement was to be made through Muller Brothers who were to be the agents, and who have always been insurance agents.

Q. When you say "We had in mind approaching Mr. Sessions if he had a good enough discount for

(Testimony of Walter Muller.)

us to operate," you meant making some kind of arrangement which would give you in some capacity an overriding profit on insurance written?

A. Through Muller Brothers.

Q. You say that is through Muller Brothers?

A. Yes, sir.

The Court: And if your client, that is, of the Automobile Club, desired some other insurance company, then the Automobile Club would make nothing out of that, that would go to the other agents?

The Witness: Yes.

The Court: That is the same as Muller Brothers?

The Witness: Yes. There are a lot of people that have a preference for a certain insurance company, and we would just assist them in making the proper contacts with any other [18] agent or any other insurance company. That would just be a function; one of the functions of the Auto Club is the insurance function, along with a lot of other services.

The Court: We are just discussing this particular phase of it now, as to the matter of the discount referred to. Was that discount to inure to the benefit of Muller Brothers only, or to the Auto Club only, or to both of them in part?

The Witness: It would be a benefit to Muller Brothers or any other agent who would write the insurance.

The Court: The policy?

The Witness: The policy, yes.

(Testimony of Walter Muller.)

The Court: And the Auto Club as such would derive no financial benefit from that transaction?

The Witness: No, sir.

Q. (By Mr. Stanbury): If a man came to you or came to the American Auto Club, or your Auto Club under any name, and said he wanted automobile insurance and did not designate a company, you would refer him to Muller Brothers?

A. Yes, sir.

Q. And the premises are all in the same offices, the office is the same, is it not?

A. We hadn't intended them to be.

Q. Have you any site selected for the American Auto Club? [19]

A. 6367 Sunset Boulevard. Across the street.

Q. Across the street from your present place, Muller Brothers? A. Yes, sir.

Q. If a person came to you and said and insisted on being insured in, let us say, the Travelers Company, with which Muller Brothers had no connection, then you would refer them to Travelers?

A. Yes, sir.

Q. You would either call up an agent of Travelers or tell them to phone Travelers?

A. That's right.

Q. The American Auto Club has no members whatever now, has it? A. No, sir.

Mr. Stanbury: I have no further questions at this time.

* * *

DON R. SESSIONS

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows: [20]

* * *

Direct Examination

By Mr. Stanbury:

Q. Mr. Sessions, you are a vice-president of each of the two plaintiff companies, are you not?

A. That is correct.

Q. And as such as you in charge of their Pacific Coast business? A. Yes, I am.

Q. How many offices do these companies have on the Pacific Coast?

A. Four branch offices.

Q. Seattle, Portland, San Francisco and Los Angeles, are they not? A. Yes.

Q. Is that right? A. That is correct.

Q. In what year were these companies organized? Let us take first the American Automobile Insurance Company, when was it organized?

A. It was organized in December, 1911, and started business January 1st, 1912.

Q. And the American Automobile Fire Insurance Company, was organized when?

A. In 1927. [21]

Q. Has the American Automobile Insurance Company been doing business continuously since January 1st, 1912? A. It has, yes.

Q. And the Fire Company since 1927?

(Testimony of Don R. Sessions.)

A. That's right.

Q. And in how many states of the Union are the plaintiff companies organized to do business?

A. In all states of the Union.

Q. In how many states of the Union are they doing business? A. In all states, I believe.

Q. Have you got the figures of the premium income of the American Automobile Insurance Company for 1948 yet? A. No, I have not.

Q. What was it for 1947?

A. The American Auto Insurance Company, it was approximately thirty million dollars.

Q. That is the American Automobile Insurance Company only, is it not? A. That's right.

Q. Do you have any separate figures on the Fire Company?

A. I have them with me. I believe I could find them.

Q. Do you have in mind now the approximate amount for 1947? [22]

A. Probably about five or six million.

Q. So the two companies combined in 1947 had a premium intake of around thirty-five or thirty-six million dollars? A. That's right.

Q. Can you tell us whether the trend in 1948 was upward or downward?

A. It was upward.

Q. So that it is more than that in '48?

A. That is correct.

Q. Sometime a few years ago the plaintiff com-

(Testimony of Don R. Sessions.)

panies entered into some sort of combination with the Associated Indemnity Company, did it not?

A. We purchased the Associated Indemnity.

Q. When was that? A. In August, 1943.

Q. Will you differentiate, take your time and give us a simple statement of the differentiation between the American Automobile Insurance Company, the American Automobile Fire Insurance Company, and the Associated Indemnity Company, with particular reference to the kind of insurance, if there is any difference, each one carries.

A. The American Auto Insurance Company writes chiefly automobile insurance, but also Workmen's compensation, general liability, burglary, plate glass. We write in the American Auto Fire the fire and collision coverages for [23] automobile and inland marine. In the Associated we mainly write workmen's compensation, some general liability, no automobile insurance any more, at least in California.

Q. Where is the California automobile insurance issued by any of these groups placed, any of these companies? In which of the three companies?

A. In the American Auto and American Auto Fire.

Q. The American Auto Fire has the collision and fire? A. Fire, theft and collision.

Q. Fire, theft and collision. The liability is in the American Automobile Insurance?

A. And the property damage.

(Testimony of Don R. Sessions.)

Q. So that all of the automobile liability insurance is in the American Auto Insurance Company? A. That is correct.

Q. All right. Approximately how many policies—I am not talking about limits of liability, but policies—are outstanding from the Los Angeles office at this time of the group.

The Court: Of the three?

Mr. Stanbury: Yes, of the three, sir.

A. Approximately fifty thousand.

Q. (By Mr. Stanbury): What percentage, approximately, are those issued by the American Auto or the American Auto Fire Insurance Companies?

A. Probably 80 per cent.

The Court: Let me see if I understand that. The premiums of the first two companies, and that is the two plaintiff companies named, in the Los Angeles area would be about $40,000 annually, is that correct?

The Witness: No. He asked me what they were nationally, I understood.

Mr. Stanbury: Policies, I said.

The Court: I didn't understand it.

The Witness: Policies this last time.

Mr. Stanbury: I just asked about policies. Before it was dollars.

The Court: Read it back, Mr. Goldstein.

(The record was read by the reporter.)

The Court: 80 per cent of them would be writ-

(Testimony of Don R. Sessions.)

ten in the names of the plaintiff companies in the Los Angeles area?

Mr. Stanbury: Yes. And thirty million would be premiums all over the country.

The Court: Now, I want to be sure the court has it straight. I want to restate it. The premiums in the American Automobile Insurance Company amounted in 1947 to about $30,000,000 in the United States?

Mr. Stanbury: Yes, sir.

The Court: Is that correct?

The Witness: Approximately so. [25]

The Court: And in the American Automobile Fire Insurance Company about five or six million dollars?

The Witness: Yes.

The Court: Then the total number of policies of these two companies issued or in effect in 1947 in the Los Angeles area was about 40,000?

The Witness: That is correct.

Mr. Stanbury: Are you aware of the existence anywhere in the United States of any other insurance company having a combination of words of American Automobile or American Auto?

The Witness: There are none to my knowledge, and the records of the insurance companies published by Best Insurance Record shows none either.

Q. (By Mr. Stanbury): You have those books here? A. I have them with me.

Q. Do you know of an organization known as the American Automobile Association?

(Testimony of Don R. Sessions.)

A. I do.

Q. What sort of organization is that?

A. They are a parent organization whose headquarters are in Washington, with which are affiliated a large number of local automobile clubs. Each one operates under a local name and not using the name American Automobile Association.

Q. Does the American Automobile Association sell or [26] render insurance service to its members or to anyone in that name, the American Automobile Association, so far as you are aware?

A. They do not, so far as I know.

Q. Can you give us a few examples of their member clubs which do deal with the public in insurance matters?

A. Among the affiliated clubs are the Automobile Club of Southern California, the California State Association, State Automobile Association, Chicago Motor Club, Detroit Auto Club, Missouri Motor Club, all under their own local names.

Q. Do you know of any organization, whether it be club or a company, or a mutual, any organization which renders insurance service or claims service in connection with automobiles or any other field under any name which combines American Auto or American Automobile, so far as you are aware? A. I do not.

The Court: That one in Washington, what is the title?

The Witness: I don't know.

(Testimony of Don R. Sessions.)

The Court: I thought you mentioned one.

Mr. Stanbury: He said headquarters in Washington.

The Witness: Yes, the parent organizations.

The Court: What is the title of that?

The Witness: American Automobile Association.

Q. (By Mr. Stanbury): Does it sell insurance or render insurance service in that name anywhere in the country, to your knowledge?

A. It does not.

Q. Its member club here is the Automobile Club of Southern California? A. Yes.

Q. All right. Have these plaintiff companies done any advertising in the name "American Auto" only?

A. Yes, we have done a great deal of it.

* * *

Q. (By Mr. Stanbury): Over what period of time?

A. Our advertising on a large scope began perhaps in the early '30s.

Mr. Rowe: I move to strike the "large scope" as a conclusion of the witness, your Honor.

The Court: I think he is probably in a position to give that without being a conclusion. The motion is denied.

Q. (By Mr. Stanbury): And continued until when, Mr. Sessions?

A. It still continues, but under the name of American Auto only it continued to 1944.

(Testimony of Don R. Sessions.)

Q. That is the time the consolidation was made with the [28] Associated Indemnity Company?

A. It was shortly after that.

Q. Do you know whether or not the words "American Auto" at the present time designate any organization in the insurance world?

A. Not to my knowledge.

Mr. Rowe: Just a moment, your Honor. Were you asking him if those words were in a name? Your question is not clear to me.

Q. (By Mr. Stanbury): Have you for the purpose of this law suit brought to court with you samples of advertising put out by these plaintiff companies? A. Yes, we have.

Q. Have you made any attempt to make this exhaustive?

A. No; these are just samples.

Q. These are examples of advertising done by these companies? A. That's right.

Mr. Rowe: May I ask, Mr. Stanbury, if the point here is that many years ago you advertised American Auto, but now you do not?

Mr. Stanbury: No. The point is that up to 1944 American Auto was habitually the name under which these companies advertised, as shown by these advertisements; that since 1944 they have not advertised as American Auto, [29] but we expect to prove that the name is firmly established as a result of past practice and still exists, but not as an advertising medium for these companies.

(Testimony of Don R. Sessions.)

Mr. Rowe: As a matter of fact, isn't it true that since 1944 and the acquisition by these two companies of the Associated Indemnity Company, and the other one which you didn't mention, Associated——

Mr. Stanbury: I have mentioned the Associated Indemnity.

Mr. Rowe: Your Honor, he spoke of three in the group, but actually there are four companies in the group.

The Witness: That is right. Associated Fire and Marine.

Mr. Rowe: You overlooked the fourth company.

Mr. Stanbury: All right.

Mr. Rowe: Isn't it true that since 1944 your advertising has been American Associates, or American Associated Companies?

Mr. Stanbury: I just got through saying that the words "American Auto" were used as the advertising medium extensively all over the country until 1944.

Mr. Rowe: My question was whether I had correctly expressed the phrase which you now advertise to the public and have since 1944, namely American Associated?

Mr. Stanbury: No; American Associated is repeatedly used in advertising, but the names of these companies still [30] appear in all those ads, as far as I know.

Mr. Rowe: That is true, but the names——

(Testimony of Don R. Sessions.)

The Court: Evidently you can't agree, so you had better bring that out by evidence.

Mr. Rowe: We probably can. Your Honor, for the sake of the record I would like to make the objection that these documents, which counsel is going to introduce are incompetent, irrelevant and immaterial by reason of counsel's statement that no advertising is now being conducted, nor since 1944 has been conducted, under the name American Auto.

If your Honor has read counsel's trial memorandum, I think your Honor will find that counsel particularly limits his cause of action to a claim of a secondary meaning in two words, not "American Automobile," but "American Auto," and I think you will find that appears repeatedly in that trial memorandum.

If counsel is now about to say that these people have abandoned that in their advertising since 1944, obviously the secondary meaning has either been abandoned by counsel, if it ever had one, or they are not longer attempting to maintain it. It seems to me that this testimony would be incompetent, irrelevant and immaterial on those particular grounds.

The Court: The objection is overruled. The court will consider all those points before making a decision. [31]

* * *

Q. (By Mr. Stanbury): On the back page of

(Testimony of Don R. Sessions.)

the cover of Underwriters' Report is an ad "American Auto Agents Prosper" at the top of the page?

A. Yes.

Q. What is the Underwriters' Report?

A. It is a weekly insurance magazine published for the Pacific Coast in San Francisco.

Mr. Stanbury: These journals I will offer consecutively, your Honor, but the loose advertising I will offer as a group.

I will offer this as Plaintiffs' next in order, if the court please.

Mr. Rowe: If your Honor please, as I have already stated I will make the objection that the documents are incompetent, irrelevant and immaterial.

The Court: It is overruled. Can't they be introduced as one exhibit?

Mr. Stanbury: Surely.

Mr. Rowe: If they are introduced as one exhibit, the time limits of the publication should be indicated, your Honor.

Mr. Stanbury: It is printed on them, but I will so [34] designate in my questions.

Q. (By Mr. Stanbury): What is the Insurance Journal, Mr. Sessions?

A. It is an insurance paper published in Los Angeles.

Q. This is an issue of July, 1936, on the cover of which is an ad headed "American Auto Agents"?

A. Yes.

(Testimony of Don R. Sessions.)

Q. The next document is a copy of the Insurance Journal, January, 1937, with an ad on the cover headed "American Auto Agents"?

A. That's right.

Q. On page 6 an article of which the headline is "American Auto Votes Stock Dividend"?

A. Yes.

* * *

Mr. Rowe: May it be stipulated that my objection will precede each one of these offers, so that I won't have to interrupt on each occasion?

Mr. Stanbury: I will so stipulate.

The Court: So understood. The ruling will be the same.

* * *

Q. (By Mr. Stanbury): I will ask you, Mr. Sessions, if [36] that "American Auto" refers to these plaintiff companies? A. It does.

Mr. Stanbury: A June, 1937, issue of the Insurance Journal, we offer the cover, which consists of the advertisement headed "American Auto Agents." The Insurance Journal for January, 1938, we offer the cover containing an advertisement headed "American Auto Agents." The January, 1939, issue of the Insurance Journal, we offer the article in column 1 of page 6, headed "American Auto in Official Changes."

Q. (By Mr. Stanbury): I will ask you, sir: that refers to these plaintiff companies, does it not?

A. It does.

* * *

(Testimony of Don R. Sessions.)

Mr. Stanbury: February, 1939, issue of the Insurance Journal, we offer page 4, column 1, the article headed "American Auto in Strong Statement."

Q. (By Mr. Stanbury): That refers to your company, does it not? A. That is correct.

Q. That is your picture with the article?

A. That's right.

Mr. Stanbury: The May, 1939, copy of the Insurance Journal, the cover alone is offered, consisting of an advertisement headed "American Auto." The January, 1940, issue of the Insurance Journal, we offer the article on page 3, column 1, headed "American Auto Reports for Year."

Q. (By Mr. Stanbury): That refers to your company, does it not? A. It does.

Mr. Stanbury: The Insurance Journal for March, 1944, the cover only is offered, consisting of an advertisement in which the words "American Auto" appear in three places where checked in red pencil.

The May, 1944, issue of the Insurance Journal, the cover alone is offered, consisting of an advertisement in which the words "American Auto" appear in six places checked with red pencil.

The November, 1944, issue of the Insurance Journal is offered for its cover, consisting of an advertisement in which the words "American Auto" appear three times where checked in red pencil.

The April, 1946, issue of the Insurance Journal is offered for the article on page 7, column 3, headed,

(Testimony of Don R. Sessions.)

"American Auto enters bond field on Coast." [38]

The Court: Is that last article referred to the company you are connected with?

The Witness: Yes.

Mr. Stanbury: The group I just referred to are offered as a combined exhibit, your Honor.

The Court: The objection is overruled and they may be received as Plaintiffs' Exhibit 3.

The Clerk: So marked.

(The documents referred to were marked Plaintiffs' Exhibit 3, and were received in evidence.)

Q. (By Mr. Stanbury): Now, I am showing you a sheet of newspaper upon which appears only a large advertisement, the top line of which is "American Auto gives you," and down at the bottom the printer's identification containing the date 1936, and ask you if you can identify that, sir.

A. This was a newspaper advertisement which was run in various large cities of the country. This happens to be from Chicago. We also ran them out here in the Los Angeles Times.

Q. Does that refer to the plaintiff companies here? A. It does.

Q. And there are three others of similar appearance in which the words "American Auto" have been checked in red pencil in their various appearances. Is the same situation true of these?

A. It is.

(Testimony of Don R. Sessions.)

Q. And they all refer to the plaintiff companies here? A. That is correct.

Mr. Stanbury: I will offer these, if your Honor please, as Plaintiffs' next combined exhibit.

Mr. Rowe: I make the same objection.

The Court: Those advertisements appeared in various newspapers in the United States?

The Witness: That's right.

The Court: The same copy appeared in each paper at various places in the country at the time the advertising campaign was being conducted?

The Witness: That is correct.

The Court: Let them be received as Plaintiffs' Exhibit 4.

This is subject to the objection heretofore made. The same ruling.

The Clerk: So marked.

(The documents referred to were marked Plaintiffs' Exhibit 4, and were received in evidence.)

Q. (By Mr. Stanbury): In producing these advertisements in this last exhibit, Mr. Sessions, the four reproduced newspaper ads, have you made any effort at all to get a complete list of the ads run by these plaintiff companies?

A. No, we have not. [40]

Q. Your object has been to provide representative examples here? A. That's right.

Q. In producing here in Exhibit 3 various copies of the Insurance Journal and one copy of the Un-

(Testimony of Don R. Sessions.)

derwriters' Report, has any effort been made to trace through other insurance journals?

A. No, it has not.

Q. Or to make a complete list of references to the American Auto?

A. No; but these same ads appeared in all of the major insurance journals of the country.

Mr. Rowe: Just a moment. I will object to that on the ground the documents or papers themselves, or exemplars of those documents, are the best evidence of that fact.

Mr. Stanbury: I submit we wouldn't have to produce every ad in order to show that we ran them, if your Honor please.

The Court: I do not believe they would have to do that, Mr. Rowe, if Mr. Sessions was familiar with it.

Mr. Rowe: May I enter my objection that the proper foundation has not been laid.

Mr. Stanbury: It was a voluntary statement that I didn't ask for in the first place.

The Court: Yes, it was a voluntary statement.

Mr. Stanbury: So as far as I am concerned, it may be stricken.

The Court: It may go out.

Mr. Stanbury: Read the question that was pending there, Mr. Reporter, please.

(The record was read by the reporter.)

Mr. Stanbury: I stipulate that everything after "No" may be stricken as a voluntary statement.

(Testimony of Don R. Sessions.)

The Court: It may go out.

Q. (By Mr. Stanbury): You have collected the Insurance Journal and brought numbers here; that journal is published where?

A. In Los Angeles.

Q. Are there insurance journals published elsewhere in the United States?

A. Yes, a great many other cities.

Q. The advertisements that are shown on the covers of certain of these copies of the Insurance Journal, which are component parts of Exhibit 3, and which speak for themselves, do you know of your own knowledge whether those same ads were run contemporaneously or concurrently in other insurance journals?

A. I do, and they were so.

Mr. Rowe: I object to that upon the ground——

The Court: Let the answer except "I do" be stricken. [42]

Mr. Rowe: We are back to the question now? I object to the question upon the ground it is incompetent, irrevelant and immaterial, and it is too general, too broad in its scope. If there are insurance journals in other places, it seems to me we are entitled to know from this witness where those journals were published, and exactly which ones of them he knows or has seen similar advertising matter run in.

* * *

Q. (By Mr. Stanbury): Do you know of your

(Testimony of Don R. Sessions.)

own knowledge, Mr. Sessions, whether the advertisements which are contained on the covers of certain numbers of these Insurance Journals, which are part of Exhibit 3, and which have the words "American Auto" on them, were run concurrently or approximately concurrently in other insurance publications?

The Court: Answer it yes or no.

A. Yes.

Q. (By Mr. Stanbury): Can you tell us in what other insurance publications those advertisements were run?

A. I recall they were run in the National Underwriter of Chicago, the Pacific Northwest Reporter published in [43] Seattle. I recall it was in the Eastern Underwriter in New York, and I believe the Pacific Insurance of San Francisco.

Q. All right. The newspaper advertising of the type shown in the component sheets of Plaintiffs' Exhibit 4, was done over how great a period of time, if you know?

A. I believe approximately three months.

Q. During what year?

A. I don't know exactly, but approximately 1936.

Q. All right. Aside from the magazine and newspaper advertising referred to, have these plaintiff companies published pamphlets, other forms of advertising, of which I hold purported samples in my hand, in the name American Auto?

A Yes, we have.

(Testimony of Don R. Sessions.)

Q. Up to what year, if you know, was that done in the name American Auto?

A. Up to approximately 1944.

Q. All right, sir. Through '44, or to it?

A. I don't know exactly.

Q. All right.

Mr. Stanbury: You gentlemen have examined that?

Mr. Rowe: Yes. If you could give us the starting time on that I would appreciate it, Mr. Stanbury.

Mr. Stanbury: I had dates on a lot of these, and I thought it was testimony without a foundation laid and I have erased a lot, and some of them can be read. They ran [44] from '35 through '44. Some of them have the dates printed on them, and I have copies of some with the penciled dates still on them that you gentlemen can see if you want to. There is one that I wish to offer separately, and the others as a group, if the court please.

Q. (By Mr. Stanbury): Calling your attention to one pamphlet upon the cover of which are the names of the plaintiff companies and the words "1942 Chart-O-Facts," can you tell me whether this is one of the publications made by these plaintiff companies? A. It is.

Q. What was done with that?

A. It was distributed to all agents and brokers in any quantity they ordered.

Q. What was the purpose of those?

(Testimony of Don R. Sessions.)

A. To show the record and history of our companies.

Q. Did any of this advertising go to the public?

A. Brokers and agents sent out most of this, and probably this too.

Q. You can't state about that particular one that you are holding in your hand?

A. No, that's right.

Q. Did the plaintiff companies provide their brokers and agents with large quantities of these things to be distributed if they so chose? [45]

A. On order from the agent and broker we did.

Mr. Stanbury: If your Honor please, and counsel, I have gone through this whole mass of advertising matter here and with a red pencil checked references to the words "American Auto" where they appear, and I would like the record to show that, that they are all marked with a red check, unless I overlooked some.

* * *

Q. (By Mr. Stanbury): Is there, as far as you are aware, any other insurance company in any field in the United States which combines these words "American Auto" or "American Automobile" in its name? A. No.

Q. Have you heard any nickname of any company other than your own companies of "American Auto"? A. No.

Mr. Stanbury: I will offer this Chart-O-Facts

(Testimony of Don R. Sessions.)

as a [50] separate exhibit next in order for the plaintiffs.

The Court: Let it be received and marked Plaintiff's Exhibit 5, and the ruling is made subject to the objection heretofore made.

(The document referred to was marked Plaintiffs' Exhibit 5, and was received in evidence.)

The Court: What about this American Autobile Association, Mr. Sessions?

Mr. Rowe: He said that is not an insurance company, your Honor. That is the differentiation that is being made.

Mr. Stanbury: No, no, that is part of the differentiation.

Mr. Rowe: I wouldn't attempt to state your whole case, Mr. Stanbury.

Q. (By Mr. Stanbury): Do you know a nickname under which the American Auto Association is known in this country?

A. They call them—they are generally known as the Triple A or Three A's.

Q. Or still another?

A. That is the only two particular names.

Q. Have you heard of AAA? A. Yes.

Q. Have you ever heard them referred to as the American Auto? [51] A. Never.

Q. Does the American Automobile Association write insurance, to your knowledge?

A. No, they do not.

Q. Or broker insurance in its own name?

(Testimony of Don R. Sessions.)

A. No.

Q. I have here a group of fifteen documents, all of which are headed "American Auto Spotlight," some of them bearing numbers; what are they?

A. Those were a series of direct mailing pieces, advertising mailing pieces, to be furnished to our agents and brokers, who in turn could send them out to their clients.

Q. And who put them out?

A. We furnished the agents and brokers with this material.

Q. By "we" you mean the plaintiff companies?

A. That's right.

Q. Over what period of time were they issued?

A. I think probably two years.

Q. And when?

A. In the middle 1930s. [52]

* * *

Mr. Stanbury: We offer this group of fifteen American Auto Spotlights as Plaintiffs' next in order.

Mr. Rowe: That is subject to the same objection, your Honor.

The Court: That is Plaintiffs' Exhibit No. 6. Let it be so marked. All exhibits of this nature, those that are similar to this, are received subject to the objection heretofore made to Plaintiffs' Exhibit 3. [53]

* * *

(Testimony of Don R. Sessions.)

(The documents referred to were marked Plaintiffs' Exhibit 6, and were received in evidence.)

Q. (By Mr. Stanbury): The next one, sir, American Auto Policyholders Digest, a small pamphlet bearing those words at the top; was that put out by the plaintiff companies? A. It was.

Q. Do you know when?

A. Approximately in the middle 1930s.

Mr. Stanbury: We will offer this as Plaintiffs' next in order.

The Court: Let it be received and marked as Plaintiffs' Exhibit 7.

The Clerk: So marked.

(The document referred to was marked Plaintiffs' Exhibit 7, and was received in evidence.)

Mr. Stanbury: I don't want to take the time of the court to identify all this material, if counsel will agree to waive identification in the record I will simply identify it with a few words.

Mr. Rowe: If Mr. Sessions will state the time at which [54] these documents were furnished to the agents and the brokers, in the middle '30s or whenever it may have been, I am perfectly satisfied.

Q. (By Mr. Stanbury): Do you know how late a period this whole group of advertising ran, sir?

A. Down through 1942, I believe.

Q. All right.

(Testimony of Don R. Sessions.)

Mr. Stanbury: There are pencil notations on some of these that I did not erase. That one has got 1940 on it.

The Court: There are none of them later than 1942, are there, Mr. Sessions?

The Witness: Not to my knowledge.

Mr. Stanbury: All right. Then we will offer this group——

The Court: You offer that group, and let it be received as Plaintiffs' Exhibit 8. Just give them to the clerk and he will put them together.

Mr. Stanbury: All right.

(The documents referred to were marked Plaintiffs' Exhibit 8, and were received in evidence.) [55]

Direct Examination
(Continued)

By Mr. Stanbury:

Q. Mr. Sessions, has there been any conscious abandonment of the name American Auto by these plaintiff companies?

Mr. Rowe: I object to the word "conscious."

Mr. Stanbury: I gather the defendant claims operation of law or by circumstantial evidence of something of the kind. However, I will withdraw the question. I think it is of small moment.

The Court: I think this is a question you can ask him: if there has been any abandonment by the

(Testimony of Don R. Sessions.)

officers of the company. That is a matter within his knowledge as president of this company.

The Witness: Vice-president.

Mr. Stanbury: I called him president. I knew better. He is vice-president.

Q. (By Mr. Stanbury): You answer the question as just [56] phrased by the court.

A. No, we have not. And the current phone books——

Q. No, you don't need to elaborate.

The Court: That isn't an answer that requires an explanation, so strike out the rest of it.

Mr. Stanbury: You have seen the local phone books, have you, Mr. Rowe?

Mr. Rowe: Yes.

Q. (By Mr. Stanbury): I call your attention, Mr. Sessions, to the latest Los Angles classified telephone directory which bears date of June, 1948. Turning to page 704 under Insurance Companies and General Agencies——

Mr. Stanbury: May I read into the record, if your Honor please, the three references?

The Court: Yes, you may.

Mr. Stanbury: In the small regular type is the following: American Associated Ins Cos 111 W 7th. TRnity 2311. Following is a box headed in bold black capitals: "American Auto Insurance Co" within the box in three lines: "Automobile and General Casualty Insurance Day or Night call," and the next line 111 W 7th TRinty 2311, the whole of

(Testimony of Don R. Sessions.)

the latter being in capitals and enclosed in a line box. And below that in the regular type: "American Auto Insurance Co 111 W 7th. TRnity 2311."

May I, if your Honor please, ask the court to look at [57] that?

The Court: You have no objection?

Mr. Rowe: None at all. I would just like to look after you do.

The Court: Which was the last one—American Auto Insurance Company?

Mr. Stanbury: Yes; there is the box there and American——

The Court: These are all under the heading "Insurance"?

Mr. Stanbury: "Insurance Companies," yes, sir. It says "Insurance Companies, Agents and Brokers," I believe, sir.

The Court: I think it says "Insurance Agents & Brokers."

Mr. Stanbury: The heading is repeated on the very column that those listings are in, if your Honor wants to look at it.

The Court: It says "Insurance Agents & Brokers."

Mr. Rowe, you may see this now.

Mr. Rowe: Are we going to use just a page?

Mr. Stanbury: I will mutilate another book to bring in here tomorrow. That one belongs to the secretary of the judge.

The Court: Are you going to offer it in evidence?

(Testimony of Don R. Sessions.)

Mr. Stanbury: I intend to offer it in evidence, but not from this book. [58]

Mr. Rowe: You are offering the entire page? If not, I would like to offer the rest of the page from "American" to "American."

Mr. Stanbury: I think the whole page should be in.

Mr. Rowe: Are you going to use the other book, too?

Mr. Stanbury: Yes. I am just using it now. You have seen it, Mr. Rowe?

Mr. Rowe: Yes, I am familiar with the other one.

Q. (By Mr. Stanbury): Calling your attention to the regular white Los Angeles Exchange telephone directory, Central Section of the Los Angeles Extended Area, May, 1948, turning to page 33 there is the following entry to begin with: "American Associated Ins Cos 111 W 7th Day & Night call TRnity 2311." Then follows, one, two, three, four, five other entries down to the following: "American Auto Ins Co 111 W 7th Day & Night call TRnity 2311."

Mr. Stanbury: Does your Honor care to see this book?

The Court: No.

Mr. Rowe: Are you going to offer that page, Mr. Stanbury?

Mr. Stanbury: I would be glad to offer it.

Mr. Rowe: Frankly, I had in mind doing the

(Testimony of Don R. Sessions.)

same thing, your Honor, offering the page. [59]

* * *

Q. (By Mr. Stanbury): Mr. Sessions, from time to time do various insurance publications print the stock quotations of the various insurance companies operating in this country?

A. They do.

Q. I will show you the National Underwriter, issue of October 28, 1948, at page 30 the fourth column under the heading "Stocks" the entry "American Auto Dividend $1.20, Bid 43," and under the "Asked" column the word "Bid." Is that portion of this magazine like others you have seen?

A. Yes, several publications publish those stock quotations.

Q. With reference to——

Mr. Rowe: Couldn't you give us an example? If it is the same thing in 100 auto publications I think we ought to have it.

Q. (By Mr. Stanbury): Will you state some of the publications which carry lists like this of the American Auto? [60]

A. The Insurance Journal carries the identical listing as far as the American Auto is concerned.

Q. Is that the right price on the stock of this company as of October '48?

A. I presume it is.

Q. Do you know any other company that is referred to as American Auto other than this one?

A. No, I do not.

(Testimony of Don R. Sessions.)

Mr. Stanbury: I will offer this as Plaintiffs' next in order, your Honor.

The Court: How much of it do you want to offer?

Mr. Stanbury: Merely the stock listing on page 30 of the issue identified.

The Court: Take a pencil there, Mr. Enstrom, and mark it. Let it be received as Plaintiffs' Exhibit No. 9.

The Clerk: So marked.

(The document referred to was marked Plaintiffs' Exhibit 9, and was received in evidence.)

Q. (By Mr. Stanbury): This morning you stated that the 1947 premium income of the American Auto, American Automobile Insurance Company, alone was about thirty million. Have you got the exact figure now?

A. Yes, I have looked it up. It is thirty-seven million.

Q. It was thirty-seven million in 1947? [61]

A. '47, yes.

Q. And that excludes the American Auto Fire?

A. That's right.

Q. Which was——

A. Approximately five million.

Q. With reference to the various pamphlets published by these plaintiff companies and received in evidence as Exhibit 8, you stated this morning that the date of issuance ran through 1942. Have you checked that over the noon hour?

(Testimony of Don R. Sessions.)

A. Yes, I found that that runs through 1943.

Q. I don't recall asking whether these companies have been doing business in California continuously since the first of 1912?

A. We have continuously since 1912.

Q. What about Los Angeles?

A. Since 1912.

Q. And approximately how many agents do these plaintiff companies have in Southern California? A. We have about 200.

Q. What proportion of those are in Los Angeles County? A. Probably 160.

Q. Have these plaintiff companies made any effort to maintain a favorable reputation with the public with whom they deal? [62]

Mr. Rowe: Just a moment. I will object to that upon the grounds it is incompetent, irrelevant and immaterial, much too broad in its scope and its application. It is uncertain and indefinite, it calls for a conclusion.

* * *

Discussion.

The Court: I think it would be a conclusion on his part as to the question asked. You might ask him as to what things have been done looking toward that end, if you desire. [63]

Q. (By Mr. Stanbury): What if anything has been done by the plaintiff companies toward the end of establishing relations with the public?

A. We have tried to maintain the best possible claims service and the best service we can render

(Testimony of Don R. Sessions.)

in all our other departments, engineering, underwriting, and so forth.

Mr. Rowe: Just a moment. May I have an objection or motion to strike the answer? I would like to move to strike the first part of the answer that they have endeavored to maintain the best possible claims service as being purely a conclusion or a statement. It has nothing to get your fingers into.

Mr. Stanbury: I just did ask him what does he mean by service.

Mr. Rowe: It is a comparative thing, the best possible claims service. As against what claims service, and how does one measure a claims service?

Mr. Stanbury: I am just about to go into that very subject, your Honor.

The Court: Read the question and the answer. I think we are taking too much time on this particular point. This company has a business of $37,000,000 in the United States, and it has 200 agents in Southern California. It seems to me it is a waste of time to ask him if they have endeavored to [64] build up this business if they have that here and have been in business since 1912 in California. But I did not want to tell you how to try your case, Mr. Stanbury.

Mr. Stanbury: I stipulate that the answer may be stricken, if it is agreeable with the court.

The Court: It may go out. He did say that they endeavored to maintain the best possible claims service. You can ask him do they have any claim agents and adjusters and all.

(Testimony of Don R. Sessions.)

Q. (By Mr. Stanbury): You have claim agents and adjusters, do you not, sir?

A. We have a large staff of adjusters in our local branch office.

Q. Do you know how many claim adjusters you have working out of the Los Angeles office of these plaintiff companies? A. About thirty. [65]

* * *

Q. Does the reputation of an insurance company with claimants and with assureds for service rendered have any effect upon that company's business, judging from your experience as an insurance executive?

Mr. Rowe: I will submit, your Honor, that question calls for an opinion and conclusion of this witness. He is not a salesman. As far as the record shows he has never been a salesman.

The Court: I think he is in position to answer that question. The objection is overruled. You may answer it.

A. It certainly does. A claim service of any company is all-important in that respect. [66]

* * *

Cross-Examination

By Mr. Rowe:

Q. Mr. Sessions, at the present time you have under common ownership or what is substantially common ownership four insurance companies?

A. That's right.

(Testimony of Don R. Sessions.)

Q. Those four insurance companies are the companies which are plaintiffs here, the Associated Indemnity Company, and I will have to ask you to give me the name of the other.

A. Associated Fire and Marine.

Q. When did the plaintiff companies acquire ownership and control of the Associated Indemnity Company?

A. They acquired ownership in August, 1943.

Q. And when did the plaintiff companies acquire ownership and control of the fourth company that you just named?

A. At the same time.

Q. In 1943? A. Yes.

Q. Are these four companies operated at the same place of business in each locality where your group of companies [67] has offices? A. Yes.

Q. Do the people who are employed by one company perform services for the other companies?

A. They are all employed and paid their salaries by the American Automobile Insurance Company, which is the parent company.

Q. In other words, anybody who performs any work or services for any of the four associated companies, or your group companies, is on the pay roll of American Automobile Insurance Company?

A. Yes.

Q. And I presume the officers and directors in the four companies are interlocking?

A. Not all the directors, no.

(Testimony of Don R. Sessions.)

Q. The officers? A. There are some.

Q. The officers?

A. Not all the officers, but there are some interlocking.

Q. In the main would the question be answered in the affirmative?

A. Of course the Associated is a subsidiary of the American Auto, and wholly owned by the American Auto, and some of the same directors are on both, and some of the [68] same officers, but not identical.

Q. The same is true for the Associated Fire Insurance Company? A. Yes.

Q. And the same is true for the Associated——

A. Indemnity?

Q. No. Marine.

A. Associated Fire and Marine?

Q. Yes. A. That's right.

Q. Since 1944 has your company engaged—withdraw that. Since 1944 has the American Automobile Insurance Company undertaken any advertising similar to the exhibits that have gone in evidence here this morning?

A. We have had the usual advertising in insurance trade papers, yes.

Q. Are those papers in the same form as the one you have presented here this morning?

A. In the same form? I don't understand.

Q. Have you copies of such documents?

A. I haven't them with me, no.

(Testimony of Don R. Sessions.)

Q. Can you produce them tomorrow?

A. Some recent magazines?

Q. Yes. A. Yes. [69]

* * *

Q. Will you produce such documents for me?

A. Insurance trade papers?

Q. Yes, similar to the material you have put in evidence this morning, which has been instigated or put out by your company since 1944.

A. I think I can find some. I will try to.

Q. Mr. Sessions, isn't it a fact that after, and very shortly after, the two plaintiff companies acquired the ownership and control of the Associated Indemnity and the Associated Marine, that the four companies together commenced to use the trade name American Associated Insurance Companies?

A. That's right.

Q. And isn't it a fact that under that name you have advertised since 1944? A. That's true.

Q. I have here a copy of an insurance directory which is published by Kirschner of Los Angeles. Are you familiar with this document?

A. Yes, I am. I have seen it.

Mr. Stanbury: I have one right here. [71]

Q. (By Mr. Rowe): I would like to direct your attention to page 21 of this document and ask if that is the general way in which you have advertised since 1944?

A. That's right, and listing our individual companies below.

(Testimony of Don R. Sessions.)

Mr. Rowe: I would like your Honor, if you care to, to see the type of advertisement.

The Court: Don't you think you had better offer it in evidence first?

Mr. Rowe: I will offer this page 21 from Kirschner's insurance directory, July, 1948, 47th Edition, in evidence.

The Court: Let it be received and marked as Defendant's Exhibit A.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

Q. (By Mr. Rowe): Isn't this method of advertising that is indicated in this exhibit a method of advertising which is followed by your company wherever it operates?

A. Yes, that's true today, yes.

Q. Shortly after——

The Court: Read that answer, please.

(The answer was read by the reporter.)

The Court: Has it been true since the end of 1943?

The Witness: I would say since the end of 1944, your Honor. [72]

The Court: I thought there was a statement made here regarding—did you make some statement after you came back stating that you looked over that exhibit?

Mr. Stanbury: As to these pamphlets, your Honor.

(Testimony of Don R. Sessions.)

The Court: What was that?

Mr. Stanbury: That these pamphlets stopped coming out at the end of '43.

The Court: That had nothing to do with the other exhibits?

Mr. Stanbury: No, I didn't refer to that.

The Court: That is Exhibit what?

Mr. Stanbury: Exhibit 8. This morning he said 1942.

The Court: Yes, this morning the statement was made that there were, I believe, as of November, 1944.

Mr. Stanbury: He said 1942 this morning and corrected it to '43.

The Court: What was said about 1944?

Mr. Stanbury: The magazine items go up through 1944 in Exhibit 3. In fact, they run through '46, these exhibits.

The Court: The one in 1946 I recall.

Mr. Stanbury: That's right.

The Court: Go ahead, Mr. Rowe.

Q. (By Mr. Rowe): At the time this method of advertising of your companies was instituted, will you state whether or [73] not American Associated Insurance Companies adopted an emblem of any kind in its advertising or in use on its stationery, or otherwise?

A. Yes, it was shortly after that that we did.

Q. I will show you here a letter addressed by you to Muller Brothers under date of October 22nd,

(Testimony of Don R. Sessions.)

1947, and ask you if that is the type of stationery that is in use by your company at this time.

A. It is with this emblem. However, now in our stationery we do not include American Automobile Fire Insurance Company or Associated Fire and Marine. We are listing the two companies, American Automobile and Associated Indemnity. That is the only difference.

Q. Do you still carry the middle portion "American Associated" in large letters separated by an emblem? A. We do.

Q. And under that "Insurance Companies"?

A. That's right.

Q. How long would you say that your stationery has been prepared in that form?

A. I would say since the end of 1944, perhaps.

Mr. Rowe: I will offer this in evidence, your Honor, not for the letter itself, but simply for the top portion of the letterhead which has the printed matter upon it, and ask that it be marked as Defendant's Exhibit next in order. [74]

The Court: Let it be received and marked as Defendant's Exhibit B.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit B, and was received in evidence.)

Q. (By Mr. Rowe): Mr. Sessions, in your office here in Los Angeles you have a telephone exchange?

A. That's right.

(Testimony of Don R. Sessions.)

Q. Do you know how your telephone girls answer the phone when the phone is rung?

A. I am not certain how they all do. I think some may say "American Associated," some may answer "Trnity 2311." I am not certain.

Q. But you would say they answer in either one of the two methods, "American Associated" or "Trinity 2311"?

A. I would say so, yes.

Q. You have offices in many of the cities of the country, do you not?

A. About 28 branch offices.

Q. And St. Louis, Missouri, is your home office?

A. That is our head office.

Q. I will show you here a telephone book from Greater St. Louis, which is the home office of your company, and direct your attention, first to page 246 of the classified section, and ask you if this listing here is that of your [75] company: American-Associated Insurance Companies, City Offices 112 North 4th Street? A. Yes.

Q. Under that appears the listing of the American Automobile Insurance Company?

A. Yes.

Q. That listing has the word "American" spelled out in full? A. Yes, it does.

Q. The word "Automobile" spelled out in full?

A. Yes.

Q. The word "Insurance" abbreviated "I-n-s"?

A. Yes.

(Testimony of Don R. Sessions.)

Q. And the word "Company" abbreviated "C-o"? A. Yes.

Q. And that is in the classified part of this directory? A. I will take your word for it.

Q. Here it is. Directing your attention to page 19, which is the alphabetical portion of this same directory, I will ask you to look at this listing American Automobile Insurance Company, which is listed in this fashion: the word "American" abbreviated to A-m-e-r, the word "Automobile" spelled out in full, the word "Insurance" abbreviated to "I-n-s," and the word "Company" abbreviated as "C-o," That [76] is your listing and that is your number, is that correct? A. That is correct.

Mr. Rowe: Your Honor, I can tear these pages if you like.

The Court: Unless you require it, or Mr. Stanbury does——

Mr. Stanbury: I don't, your Honor, not at all.

Mr. Rowe: I think I would like to offer the full page from American to American in both classified and alphabetical, and I will extract them from here, if I may do so, and I will ask that those two pages be offered as Defendant's Exhibit next in order.

The Court: When they are properly presented they may be received and marked together as Defendant's Exhibit C.

The Clerk: So marked.

(The documents referred to were marked Defendant's Exhibit C, and were received in evidence.)

(Testimony of Don R. Sessions.)

Q. (By Mr. Rowe): Do you have offices in Washington, D. C.?

A. We have no branch there. We might have a service office, I don't know.

Q. I will show you here——

Mr. Stanbury: If your Honor please, I am objecting to anything as far afield as Washington, D. C. I didn't object to St. Louis, as it is the home office, but I don't understand that this defendant intends to do business in Washington, [77] D. C. It is a Southern California matter.

Mr. Rowe: We are dealing here, your Honor, with what I understand to be are two companies who are qualified to transact business in every state of the United States. The claim is made they are holding on to the words "American Auto" by reason of the fact, one fact among others, that there is a listing in the Los Angeles telephone book in that manner. I think we are entitled to show, as far as we have been able to find this company, the manner in which it is listed, and I have, frankly, about ten cities that I have gotten directories of, and I want to show your Honor how the listings are in those cities.

Mr. Stanbury: I don't know what city might become material, such as Pasadena or Long Beach or——

Mr. Rowe: These are not.

Mr. Stanbury (Continuing): ——or close by here, but Washington, D. C., I submit, is too re-

(Testimony of Don R. Sessions.)

mote to affect in any way any issue in this case.

Mr. Rowe: A trade name is not confined to a district where a corporation is operating on a national scale. It is either a trade name nationally or it isn't a trade name.

Mr. Stanbury: If your Honor please, we are not contending a trade name at all; we are contending secondary meaning.

Mr. Rowe: It is the same thing. [78]

Mr. Stanbury: It is very different. In the present use of it it may make no difference in the way counsel means it.

Mr. Rowe: I don't mean a registered trademark.

Mr. Stanbury: If counsel uses the word "trade name" in its technical significance, I want him to know at this time that we are not contending any trade name. I submit the question here is whether or not there is any interference with the operations of these plaintiff companies by the proposed business of the defendant in this locality where the defendant proposes to operate. And in that connection it is true we have only produced 1948 phone books, but I should go back——

Mr. Rowe: I have the men here who will testify——

The Court: I wish you gentlemen would speak one at a time. Mr. Goldstein is an excellent reporter, but he can't take down the speeches of two persons at the same time.

(Testimony of Don R. Sessions.)

Mr. Stanbury: We will show in this locality these companies have been listed as shown in these books before this law suit or the American Auto Club was ever heard of in this locality, and I submit that is the question.

Mr. Rowe: May I say one word in reply? I think your Honor will recall that during the course of the plaintiff's evidence proof was put in of publication in insurance journals in several cities throughout the United States indicating [79] that at least on that issue plaintiff was not as confined in his thinking as it is on this issue, and we think that the trade name——

The Court: It seems to the court that it is proper evidence to rebut the inference that might be drawn from the other testimony, but if there is no question about this, perhaps you might stipulate to it and save the time.

Mr. Stanbury: If I was shown the books I, of course, will stipulate immediately to what it shows.

Mr. Rowe: It is about time for the 3:00 o'clock recess. Would your Honor like to adjourn for a moment so he can look at them? We have about ten.

The Court: If we can save time by a short recess.

Mr. Rowe: While Mr. Stanbury is looking at one, if I may call particular attention to this one from Washington, D. C.——

The Court: You had better wait. He has to conduct this case.

(Testimony of Don R. Sessions.)

Mr. Stanbury: I will look at it now.

(Slight delay in proceedings.)

Mr. Rowe: I will offer this book in evidence, if I may, as Defendant's Exhibit next in order. That is page 382 of the classified list of the Washington telephone directory, and ask that it be received in evidence and marked Defendant's Exhibit next in order. [80]

The Court: Let it be received and marked as Defendant's Exhibit D.

(The book referred to was marked Defendant's Exhibit D, and was received in evidence.)

Mr. Rowe: I would like to call your Honor's attention, if I may, to the listing. The first listing, American Associated Insurance Companies, the words American-Associated being hyphenated, immediately followed by American Automobile Insurance Company, with each word spelled out in full, and that is immediately followed by American Automobile Insurance Company of St. Louis, and in the advertising the emblem which appears on the stationery that I just introduced in evidence—and that emblem, by the way, Mr. Stanbury, or the letters on there A.A.I.C., stand for American-Associated Insurance Companies, isn't that correct?

The Witness: It does for that, and could also stand for American Automobile Insurance Company, the same letters.

Q. (By Mr. Rowe): Isn't it designed to stand

(Testimony of Don R. Sessions.)

for the four as your Associated Insurance Company emblem?

A. Yes, I think that is a fair statement. [81]

* * *

Mr. Rowe: May it please the court, I think Mr. Stanbury and I are prepared to stipulate as follows: In each of the telephone books which I will shortly identify the plaintiff company is listed as American Automobile Insurance Company. In some instances with the word "American" abbreviated to "A-m-e-r," in other instances the word "Insurance" is abbreviated to "I-n-s," and the word "Company" to "C-o." In no instance is the word "Automobile" abbreviated. Is that correct?

Mr. Stanbury: So stipulated.

Mr. Rowe: I have, your Honor, torn the pages from these various books and I would like to introduce the entire pages that I have torn for the purposes of carrying out the stipulation as well as for the purpose of indicating the great number of other concerns which have as a part of their name the word "American," and in some instances concerns which have "American Auto" as parts of these names.

Mr. Stanbury: If your Honor please, I have no objection to these pages going in for the purpose stated, although I submit that reading it in the record is enough. When counsel says there are other concerns here——

Mr. Rowe: I have here—— [82]

(Testimony of Don R. Sessions.)

Mr. Stanbury: I know, it says American Auto Body and Radiator Service on Fairmount Avenue in Philadelphia, I submit that is not material to this law suit, and I haven't——

The Court: I don't suppose you care about anything that doesn't have to do with insurance, do you?

Mr. Rowe: I think in an instance of this kind that we are not confined solely to insurance, no.

The Court: Of course, it is a matter of common knowledge, it is one of which the court will take judicial notice, that there are many concerns that use the word "American."

Mr. Stanbury: Certainly.

The Court: Of almost every industry.

Mr. Rowe: And in some of these books, your Honor, there are concerns which use the word "American" coupled with the word "Auto," such as the case in Los Angles.

The Court: If that is the case, I think it is proper. But when it comes to "American Radiator" or "American Brick" or "American Bakeries," I don't think that would serve any purpose.

Mr. Rowe: The exhibits have been cut down to pages like that. I have torn them from the book.

The Court: If there is an objection to the use of any of these other names of American generally, I think that objection is good. Anything that has to do with "Automobile" or "Insurance," I think that is proper. [83]

(Testimony of Don R. Sessions.)

Mr. Rowe: I don't want to argue at this point.

The Court: You don't need to, as far as that is concerned.

Mr. Rowe: May I just make a short statement?

The Court: Yes.

Mr. Rowe: I think Mr. Stanbury will rely upon cases which have to do with the problem that competition is not essential in a name case, and therefore I think the companies which have the same name that are in non-competitive businesses are a material factor in the case. His trial brief indicates that.

Mr. Stanbury: That is true, competition isn't necessary, but there is to be no effort to enjoin an American Body and Radiator Service. I haven't looked at this with eyes aimed at this point at all, but my objection is that the fact that there is an American Auto Body and Radiator Service on Fairmount Avenue in Philadelphia is completely immaterial.

The Court: I think it is, too, and that will be the ruling of the court.

If you desire to offer it as limited, and you have made your statement, Mr. Rowe, I think it is sufficient, the court will receive it.

Mr. Rowe: As I understand it, the offer will, by reason of the ruling of the court, be limited to the listing of the [84] plaintiff companies or one of its associated companies; is that correct?

The Court: No, no. Anything that has to do

(Testimony of Don R. Sessions.)
with the use of the word "American" and "Automobile," except Body and Fender. I don't think that should go in. But I think anything that has to do with insurance business of any type is proper.

Mr. Rowe: Then I will offer it along the lines that your Honor suggested.

Mr. Stanbury: If there is such, I wish to know about it now, your Honor, because I didn't know about this angle of it at all, and if counsel has in mind any insurance concern that has "American Auto" in it, I ask that it be pointed out to me now so that we can investigate it.

Mr. Rowe: I have none in this book, nor do I know of any in the books which will follow.

Mr. Stanbury: All right, then. That is satisfactory.

Mr. Rowe: Then I will offer at this time, your Honor, as Defendant's Exhibit next in order, pages No. 23, 24, 25 and 26, consisting actually of two pages from the Philadelphia phone directory dated May, 1948.

Mr. Stanbury: If your Honor please, I thought that our stipulation was broad enough to avoid cluttering up the record with these exhibits. It may be confusing later on. I stipulated to the whole substance of all of them. [85]

The Court: I see no purpose in offering this if your stipulation covers it, Mr. Rowe.

Mr. Rowe: Our stipulation, as I understood it——

(Testimony of Don R. Sessions.)

The Court: You stated you wanted to offer it to support the stipulation. You don't need to support a stipulation by evidence.

Mr. Rowe: I can see that. The point is the stipulation obviates the necessity of pointing out the particular listing or how it is listed. I thought we were saving time in that fashion. I did not intend to limit myself to an exclusion of the names of various concerns starting with the word "American." I think that is material to the case. If your Honor will not permit——

The Court: Do you think American Bank Equipment Company——

Mr. Rowe: Only as indicating a universal use of the word "American" in almost every kind of industry.

The Court: That is a matter of which the court will take judicial notice. You don't have to support it by proof.

Mr. Rowe: If your Honor will take judicial notice of all these matters——

The Court: I don't take judicial notice of all matters, but I take judicial notice of the fact that the word "American" is used in a variety of businesses, industries. [86] Take, for exemple, here there are pages of them in this one directory.

Mr. Rowe: That is correct.

The Court: I don't think the court should have to take the time on that.

There is a case in 180 Cal., about the leading

(Testimony of Don R. Sessions.)

case in regard to the matter of judicial notice in the State of California, Varcoe v. Lee, where matters are of such common knowledge in the community as the use of the word "American" in industrial and business operations, the court is compelled to recognize that and to take judicial notice of that. That is Varcoe v. Lee, 180 Cal.

Another case is People v. Tossetti, I think that is in 107 Cal. App., at page 7. And there are numbers of cases along that line; almost as innumerable are the cases as the use of the word "American" on these pages you have presented.

Mr. Rowe: It may be an overabundance of caution. I found in some cases that I have read proof was made of matters such as I am trying to get in evidence in the manner I am attempting to do it, and I felt that should be done.

The Court: I think it will appear in the record from the statements made here that there are several columns on these pages that you have offered here of closely written printed matter where the concerns listed begin with the word "American."

Mr. Rowe: I would also like to have in the record, if [87] your Honor deems it proper, the two or three listings there that carry the words "American Auto," with the word "Auto" abbreviated, or at least put in that form.

The Court: I think that is proper, "American Auto Association."

Mr. Rowe: Yes.

(Testimony of Don R. Sessions.)

The Court: And just above that "American Auto Body & Radiator Service," there is the abbreviation.

Mr. Rowe: And just below it are two or three.

The Court: And American Auto Publication, American Auto Radiator, American Automobile Touring Alliance, and there are numbers of them——

Mr. Rowe: Those are the ones I was particularly anxious to get in the record, so those will be made a part of the record, your Honor.

The Court: They may be made. They have been read into the record. Anything that has been read into the record you don't need to offer exhibits regarding them.

Mr. Rowe: In line with what your Honor has just said, and reading from page 13 of the Pacific Telephone directory dated July, 1948, I would like to call attention to the following listings: American Automatic Typewriter Company, American Auto Crematory, American Auto Fabric Co., the plaintiff company Amer, A-m-e-r, "Automobile" spelled out, Ins Co, Amer Auto Repair Co. [88]

From page 13 of the Baltimore Telephone directory under date of September, 1948——

Mr. Stanbury: Go ahead and read them, Mr. Rowe.

Mr. Rowe: I call attention to the following listings: American Auto Parts Co., American Auto Repair Service, American Automobile Association, abbreviated.

(Testimony of Don R. Sessions.)

Our stipulation that we have made applies likewise to the Minneapolis telephone directory. I would like to call attention to: American Automobile Association, with the word "Association" abbreviated, American Auto Body Repairing Co., with "Repairing" abbreviated, American Auto Parts Co., with "American" abbreviated down to the two letters "A-m."

In the San Francisco directory of May, 1948: American Automobile Association, with the word "American" abbreviated "A-m-e-r." The same abbreviation for "American Automobile Driving School." The same abbreviation for the two plaintiff companies.

From the Detroit Telephone directory dated December, 1948 the following listings: American Auto Appraisal, with the word "American" abbreviated A-m-e-r. That abbreviation is the same in each one that I will read. American Auto Felt Corporation, American Auto Parts and Fender Co., American Auto Sales, American Auto Service Co., American Automobile Dealers Association, American Automobile, The followed by [89] P-b-n, which I assume means publication.

Q. (By Mr. Rowe): Mr. Sessions, in selling the policies of insurance which your companies issue, the sales to the public or to the assureds are made entirely through licensed agents and brokers, are they not?

A. That is correct.

(Testimony of Don R. Sessions.)

Q. Do you in your operations work with any automobile clubs as far as discounts on premiums are concerned, or things of that sort?

A. Yes, all stock casualty companies do give discounts for a certain club.

Q. Will you tell me the names of some of the clubs?

A. There is only one club that I know of, and it is owned by the Board of fire companies, the National Automobile Club.

Q. The National Automobile Club?

A. Yes.

Q. Does your company own any stock in that concern? A. None at all, no, sir.

Q. It does not? A. No. [90]

* * *

Q. (By Mr. Rowe): Mr. Sessions, there has just been handed me an Insurance Journal of July, 1948; is that the same publication, earlier copies of which were introduced in evidence this morning through your testimony?

A. It is.

Q. Directing your attention to the inside of the first page or cover page of that Journal, which bears date, by the way, of July, 1948, is the inside an advertisement inserted by the plaintiff companies of the American Associated Insurance Companies? A. It is.

Mr. Rowe: I will ask that the cover page be ad-

(Testimony of Don R. Sessions.)

mitted in evidence and marked Defendant's Exhibit next in order.

The Court: It may be received in evidence. I am not sure, Mr. Rowe, whether that is the cover page or whether that is the inside of the cover page.

Mr. Rowe: The inside of the cover page, your Honor.

The Court: Let it be received and marked as Defendant's [93] Exhibit E.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit E, and was received in evidence.)

Q. (By Mr. Rowe): Referring now, Mr. Sessions, to Defendant's Exhibit E, may I ask if you know how long the American Associated Insurance Companies have been advertising in the Insurance Journal in the manner indicated by this last exhibit, or in some similar manner?

A. By "manner" what do you mean?

Q. The set-up of the ad.

A. The present trade-mark there or emblem?

Q. Yes, the present trade-mark under which your companies operate.

A. It is an emblem, and with those names that would be since about 1944, I should say.

Q. And—— A. End of 1944.

Q. Since 1944, where this emblem that you refer to and the names American Associated Insurance

(Testimony of Don R. Sessions.)

Companies have appeared, the actual names of the company appeared at some other point in the advertisement with each word of the name spelled out completely, is that correct?

A. I believe it is.

Q. And that has been since 1944? [94]

A. Yes.

Q. Mr. Sessions, directing your attention to the column or lower half-column headed "Stocks" appearing on page 30 of the National Underwriter, which is Plaintiffs' Exhibit No. 9, I would like to ask you whether or not you are familiar with the manner in which companies are named in stock quotations, both in newspapers and in other journals wherein stock quotations are published?

A. I only know what I see here.

Q. You are not familiar at all with the manner in which stock quotations are published in the daily newspapers, for example?

A. Yes, I see them occasionally there.

Q. Have you ever seen them in the Wall Street Journal?

A. I don't take the Wall Street Journal.

Q. Have you ever examined a copy of the Wall Street Journal?

A. I have seen a copy years ago.

Q. Have you ever examined the stock quotations in the Wall Street Journal?

A. Not for years.

Q. Isn't it a fact, to your knowledge, that it is

(Testimony of Don R. Sessions.)

customary in giving stock quotations to abbreviate a name almost to the shortest possible point—withdraw the latter part—to abbreviate the name of the listed company? [95]

Mr. Stanbury: I will stipulate to that if it will save time, Mr. Rowe.

Q. (By Mr. Rowe): May I ask if you are suggesting that this abbreviation flows from the American Automobile Insurance Company, or from the abbreviation of the publisher?

A. I don't know.

Q. You at no time have ever requested the publisher of that publication to either list your stock in such a quotation or to abbreviate it in any particular manner?

A. That material is published in Chicago, and I have no dealings with it personally.

Mr. Rowe: That is all. [96]

* * *

WILLIAM E. WELSH

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. What is your occupation?

A. Insurance agent.

Q. How long have you been an insurance agent?

A. About 27 years.

(Testimony of William E. Welsh.)

Q. Have you had for many years past a rather close connection with the insurance business in this county? A. Yes, sir.

Q. Are you a past president of the National Association of Insurance Agents?

A. Yes, sir.

Q. And a past president of the California Association of Insurance Agents? [97]

A. Yes, sir.

Q. And I understand you are in business—you have your own office here, have you not?

A. Yes, sir.

Q. It is located in Pasadena? A. Yes, sir.

Q. That is, you are in business for yourself?

A. Yes, sir.

Q. You are an accredited agent of the American Auto and American Automobile Fire Insurance Companies? A. Yes, sir.

Q. For how long have you been?

A. About 21 years.

Q. Have you had occasion during that time to talk to people, to the public—let us take it up separately. Have you had occasion to talk to people engaged in the insurance business about these plaintiff companies? A. Yes, sir.

Q. Have you had occasion to talk to members of the public concerning these plaintiff companies?

A. Yes, sir.

Q. By what manner or means would you be talking to members of the public about the plaintiff companies?

(Testimony of William E. Welsh.)

A. About purchasing a contract of insurance.

Q. Can you tell us whether or not there is any nickname [98] of these plaintiff companies that is in common usage in this county? A. Yes, sir.

Q. What is it? A. American Auto.

Q. Have you heard of any other organization of any kind, whether the Triple A or anything else, referred to as the American Auto?

A. No, sir.

Q. Have you ever heard the American Automobile Association referred to as the American Auto or American Automobile?

A. I don't recall it.

* * *

Q. Do you recall when the American Automobile Insurance Company purchased the Associated Indemnity and the Associated Indemnity Fire and Marine, or Associated Fire and Marine Company?

A. Yes, sir. [99]

* * *

Q. How often do you have occasion to speak of these plaintiff companies nowadays in the course of your business?

A pretty regularly.

Q. What do you mean by pretty regularly?

A. Well, about 65 per cent of my business is American Automobile Insurance policies. Naturally during the course of the day that name American Auto is referred to dozens and dozens of times.

Q. All right. Now, let's take it up one thing at

(Testimony of William E. Welsh.)

a time here. You have office associates, I presume?

A. Yes, sir.

Q. How do you and your office associates among yourselves refer to these plaintiff companies nowadays? A. American Auto.

Q. Have you stopped calling it American Auto since the merger with the Associated?

A. No, sir.

Q. Do you ever refer to it in conversation as American Associated Company, nowadays?

A. No, sir.

Q. When you are talking to assureds, in what manner does the name of the company ever come up when you are [100] talking to an assured?

A. To the best of my knowledge, American Auto. It has been so long familiar with me.

Q. What brings it up, how do you happen to be talking to a member of the public about these companies?

A. They ask me the name of the company they are going to place their automobile insurance in, or they wish to discuss something about the company that I am placing their business with.

Q. Do you ever recall having heard anybody refer to these plaintiff companies as American Associated? A. Very rarely.

Q. From your experience in the insurance business are there any companies designated by the simple words "American Auto"? A. No.

Q. Are there any companies connoted or denoted

(Testimony of William E. Welsh.)

by the words "American Auto" from your experience? A. Not that I know of.

Q. How do you connote or denote these plaintiff companies? A. American Auto. [101]

* * *

Q. Are you familiar with the claim service rendered by this company during your association with it? A. Very.

Q. Are you familiar with the service rendered by this company to its assureds during the time you have been associated with it? A. Yes, sir.

Q. If an insured of these plaintiff companies has purchased a policy through you and has a claim to make against the company under a collision or fire policy, or a claim against him by some third party, do they ever come through you after their accident before dealing with the plaintiff companies? A. Almost always.

Q. That is the usual routine?

A. Yes, sir. [102]

* * *

Q. Does the American Automobile Insurance Company and American Automobile and Fire Insurance Company, do they have a reputation good or bad in this community, based upon your knowledge, from your experience, in their claim policy?

A. Good.

Mr. Rowe: I move to strike the answer.

The Court: Let the answer go out. It was a premature answer.

(Testimony of William E. Welsh.)

Q. (By Mr. Stanbury): I ask if it does have a reputation. [104]

The Court: Just answer it yes or no.

A. Yes.

Q. (By Mr. Stanbury): What is that reputation?

Mr. Rowe: Just a moment. I will object to that question on the ground there is no proper foundation laid.

The Court: Yes, I think that objection is good. I think you should lay a better foundation.

Mr. Stanbury: All right, sir.

Q. (By Mr. Stanbury): How many assureds do you have insured in the American Auto right now? A. Approximately 1500.

Q. All right. How long have you had a thousand or more people, clients of yours, insured in the American Auto? A. At least ten years.

Q. During the course of those ten years to what extent have your assureds had occasion to present claims of some kind, either in their own behalf or against them? A. It is pretty hard to say.

Q. Is it an occurrence once a month, once a year, or what? A. Each assured?

Q. No. Over all. In other words, how many claims involving assureds of the American Auto, either as the objects of a claim or the claimant, would you say you handle [105] in the course of a year?

A. I would judge between a thousand and twelve hundred claims a year.

(Testimony of William E. Welsh.)

The Court: Do you mean there are that many claims against them?

The Witness: Presented to us.

Q. (By Mr. Stanbury): Do you mean every assured has a claim?

A. Some have more than one.

The Court: They run an average of one——

The Witness: He asked me, and I said approximately 1500 clients, and I would say during the year we would take somewhere around a thousand applications for losses a year.

Q. (By Mr. Stanbury): You are talking about fender damages and everything else?

A. All kinds of automobile losses.

Mr. Stanbury: I have no further questions, sir. Thank you.

Cross-Examination

By Mr. Rowe:

Q. Mr. Welsh, you have been in the insurance agency business, you say, for about 27 years?

A. About that, sir.

Q. And for at least 20 years of that time you have been an agent of either one or both of the plaintiff companies? [106]

A. Yes, sir.

Q. About 65 per cent of your business is done with those companies? A. Yes, sir.

Q. What other companies do you represent?

A. Insurance Company of North America, Northern Insurance Company of New York, Ameri-

(Testimony of William E. Welsh.)

can Insurance Company of Newark, Fidelity & Deposit, London, Liverpool, and London and Lancashire.

Q. In placing insurance in these various companies, may I ask if the selection of the company in the ordinary case is left to you?

A. Yes, sir.

Q. In other words, a person is a client of yours whom you serve in the insurance field, is that correct? A. Yes, sir.

Q. And you yourself are in the nature of a professional man in that field? A. I hope so.

Q. That is, you regard yourself as such?

A. Yes, sir.

Q. And you yourself are familiar with the many insurance companies which are operating in California the casualty and other insurance fields?

A. Yes, sir. [107]

Q. You have known these plaintiff companies for a great number of years? A. Yes, sir.

Q. There is nothing that confuses you about the American Auto Club, is there?

A. Yes, sir.

Q. What?

A. We undoubtedly would get call after call on our telephone system regarding——

Mr. Rowe: I didn't ask that. I ask that the answer go out.

Q. (By Mr. Rowe): I am talking about you, Mr. Welsh, you have known these two companies for about 20 years——

(Testimony of William E. Welsh.)

A. I beg your pardon. I misunderstood the question.

Q. There is nothing that would confuse you as an individual? A. I don't think so.

Q. Or as an insurance broker?

A. I don't think so.

Q. You have been in it so long and you know so much about it that your knowledge takes you beyond the realm of confusion, isn't that true?

A. I think so.

Q. Isn't that generally true of other experienced insurance brokers? [108]

A. I couldn't answer that.

Mr. Rowe: I have no further questions.

WILLIAM B. GLASSICK,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. Mr. Glassick, you also are an insurance agent, are you not, sir? A. Yes, sir.

Q. You have your own business that you operate in Hollywood, I believe?

A. That's right.

Q. How long have you been an insurance agent?

A. Since 1924.

Q. Have you held any office in the Association of Insurance Agents? A. I have.

(Testimony of William B. Glassick.)

Q. What office, sir?

A. I have been president of the Insurance Association of Los Angeles, and also president of the California Association [109] of Insurance Agents.

Q. Have you had occasion in your business to talk to people about these plaintiff companies?

A. We have.

Q. Can you tell us whether or not there is any common designation or nickname by which these companies are referred to?

A. Well, among——

Mr. Rowe: Just a moment. I will object to that question on the ground it is too general. I think we are entitled to know what persons he is talking to, whether he is talking to insurance men, as the other man was, or to whom he was talking.

Mr. Stanbury: I will tell you what I will do, your Honor. This is a most unusual thought. To save a lot of time here—and I realize it will take a stipulation to do it, but I am willing to throw this case into the telephone directory and let somebody pick out every sixth name among the brokers, and call up and ask, "Is there an outfit in this town known as American Auto, and who is it?"

Mr. Rowe: I will tell you, if you will give some consideration to this type of stipulation I might go along with you. Let's have the clerk stop every sixth man who comes down the corridor and ask him if he knows, if he owns an automobile, and if he answers in the affirmative to ask [110] him if he

(Testimony of William B. Glassick.)

knows what company carries his automobile insurance.

Mr. Stanbury: I don't know about that.

Mr. Rowe: Ask him that. You are talking about good will of the company.

The Court: Apparently these proffered stipulations aren't going to save any time.

I think the question is too general, Mr. Stanbury.

Mr. Stanbury: All right, sir.

Q. (By Mr. Stanbury): With whom do you ever have occasion to refer to either of these two plaintiff companies?

A. Our staff and the clients with whom we do business.

Q. And the clients with whom you do business would be who?

A. They would be policyholders in the American Auto.

Q. Let's take it up one thing at a time. Your staff around the office, is there any designation by which these plaintiff companies are habitually referred to?

The Court: Answer that yes or no.

A. Yes.

Q. (By Mr. Stanbury): What is it?

A. American Auto.

Q. In talking to assureds is there any common term applied to these plaintiff companies?

A. Yes. [111]

Mr. Rowe: By the assureds?

(Testimony of William B. Glassick.)

Q. (By Mr. Stanbury): By the assureds, whoever mentions the company——

The Court: I think it is a compound question.

Mr. Stanbury: All right.

Q. (By Mr. Stanbury): Have you had occasion to talk to assureds yourself? A. Yes.

Q. All right. So far as you personally are concerned, when you refer to these plaintiff companies, is there any designation which you use?

A. There is.

Q. What is it? A. American Auto.

Q. Have you had occasion to hear assured refer to these companies? A. Yes, we have.

Q. Can you tell us whether there is any common designation generally used by lay people who refer to the companies? A. Yes.

Q. What is it? A. American Auto.

Q. Do you know of any other concern that is referred to as American Auto, sir, besides these plaintiff companies? [112] A. No. I do not.

Q. Have you ever heard the American Automobile Association referred to as American Auto or American Automobile? A. No.

Q. Do you recall when the American Automobile Insurance Company bought the Associated Companies? A. I do.

Q. Have you since that time heard any general usage of the term "American Associated" in referring to these companies in conversation?

A. I have not.

(Testimony of William B. Glassick.)

Q. Can you tell us whether or not at this time these companies are still referred to as American Auto by those persons whom you have generally designated in your previous answers here.

A. Yes, sir.

Mr. Stanbury: Cross-examine.

Cross-Examination

By Mr. Rowe:

Q. Have you called the offices of these plaintiff companies lately? A. Yes, sir.

Q. How is the telephone answered?

A. I think sometimes they answer it "American Associated" and sometimes "Trinity 2311."

Q. They never answer "American Auto" and haven't for a number of years, have they?

A. I don't believe they have.

Q. In dealing with your clients—I assume you are an independent agent, is that correct?

A. That's right.

Q. And you represent a number of companies?

A. That's right.

Q. You have a clientele that consists of individuals, companies and corporations, is that correct?

A. That is correct.

Q. When a person consults you about buying automobile insurance could you tell me what per cent of the people leave it to you to designate the company in which the insurance is to be placed?

Mr. Stanbury: That is objected to as not proper cross-examination, your Honor.

(Testimony of William B. Glassick.)

The Court: It seems to the court that it isn't proper cross-examination.

Mr. Rowe: Your Honor, this is the point, if I might just explain it before you make a final ruling on it. You have in this particular type of case—and I have the authorities which will substantiate the proposition—a completely different situation than you have with a person [114] who goes into the store and buys a can of beans from a counter by reference to a trade name. I could probably make my point more clearly if you will just let me read from a case.

I might preface a reading of portions of this with a statement that this case on its facts is the closest to the instant litigation of any that has come to my attention.

This is a suit by Standard Accident Insurance Company against Standard Surety and Casualty Company of New York. It is reported in 53. Fed. 2d at page 119, and it is a decision of Frank J. Coleman, District Judge. The opinion commences:

(Portions of opinion read.)

The Court: We will hear what Mr. Stanbury has to say.

Mr. Stanbury: I submit this argument is nothing but an argument out of place and has no bearing on the objection——

The Court: I think it does with regard to the particular question, Mr. Stanbury. The question

(Testimony of William B. Glassick.)

was whether the person who takes out the policy of this type of insurance would care in what company it was placed. There is something in there. Mr. Rowe continued to read after that. It goes to show the value of presenting in advance the authority so the court may know your position without having to take the time.

Mr. Rowe: I thought it was a good opportunity for me to acquaint your Honor with this.

Mr. Stanbury: Seventy-eight volumes later, in 103 Fed. (2d) the Aetna Casualty & Surety Company was allowed to enjoin the Aetna Auto Finance Company from the use of its nickname "Aetna Auto," which, if I may use the colloquial expression, is a ringer case for the one we have before us.

(Discussion)

* * *

The Court: The objection is overruled. Read the question.

(The question referred to was read by the reporter as follows: "When a person consults you about buying automobile insurance, could you tell me what per cent of the people leave it to you to designate the company in which the insurance is to be placed?")

The Witness: It is a little difficult to say what per cent. Clients that are well known to the office would undoubtedly leave it to our judgment. However, there are people who are new to us or new to

(Testimony of William B. Glassick.)

the office that will frequently ask, "What company are you going to place the insurance in?" and then we would name the company, and many times they select the American Auto.

Q. (By Mr. Rowe): Can you give me an idea of how frequently such an occasion as that will occur in your business? I presume you interview a number of people either a day or month, don't you?

A. Yes, either I or the staff.

Q. Would you say that would occur in more than one, [125] two, three, four, five per cent of the instances?

A. In which they ask the name of the company?

Q. That's right.

A. Yes, I would say it would occur more than that. It probably would happen, possibly, eight or ten times a month.

Q. Eight or ten times a month? A. Yes.

Q. And how many policies do you place a month?

A. Do you mean all policies?

Q. Yes. A. About 500.

Q. The fact of the matter is, is it not, that an insurance agent such as you are in selling insurance to the public sells it as a result of his good will, rather than any good will of the insurance company?

Mr. Stanbury: That is objected to as not proper cross-examination, your Honor, wholly outside anything this witness was asked. I am deprived of the opportunity to cross-examine and the defendant is given a free cross-examination of a witness who

(Testimony of William B. Glassick.)

hasn't said anything on this subject whatever.

Mr. Rowe: I will withdraw the question.

Q. (By Mr. Rowe): Did I ask you how many companies you have in your office?

A. No, you didn't. [126]

Q. Will you tell me?

A. I would say probably about 15.

Q. Are they all casualty, or do you have all kinds?

A. All lines, fire, casualty, inland marine.

The Court: No life insurance?

The Witness: Yes, life insurance, too.

The Court: These answers that you were giving referred to the others, to the exclusion of life insurance?

The Witness: Yes, sir.

The Court: You didn't include life insurance?

The Witness: I did not include life insurance.

Q. (By Mr. Rowe): You have, I presume, a list of clients that you have developed over a period of time? A. That's right.

Q. Under your agency agreement with the plaintiff companies, if you have such an agreement—I perhaps first should ask do you have an agency agreement with the plaintiff company?

A. We do.

Q. You don't happen to have a copy of it with you, do you? A. No, I do not. [127]

MARK A. WELLS

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. What is your occupation, Mr. Wells?

A. I am editor and publisher of the Insurance Journal.

Q. That is this magazine of which several copies are introduced as Exhibit 3 here?

A. That's right.

Q. How long have you been in the insurance publication business? [128]

A. Approximately 21 years.

Q. Continuously? A. Continuously.

Q. Your office is where?

A. At 704 South Spring Street, Los Angeles.

Q. Have you been in Los Angeles in this business during the whole of that 21 years?

A. That entire time.

Q. And during that time have you had occasion to speak of these plaintiff companies to people?

A. Many times.

Q. Have you had occasion to have people speak of these companies to you? A. Many times.

Q. Under what circumstances, sir?

A. Virtually every imaginable circumstance pertaining to the business of insurance. Editorially when the question developed in the news; references

(Testimony of Mark A. Wells.)

to the paper, inquiries from assureds; anything that might come within the realm of the business itself.

Q. And I assume you have had occasion to talk, likewise, about many other insurance companies?

A. Many.

Q. All right. Is there any common designation or nickname by which these plaintiffs are commonly referred to? [129]

A. Do you mean today?

Q. Yes. A. The American Auto.

Q. Your answer is there is? A. There is.

Q. What is it? A. American Auto.

Q. Do you recall that the American Auto bought the Associated Companies here a few years ago?

A. Yes, I recall.

Q. Have you heard any remarks or conversation referring to these plaintiffs as American Associates in conversation? A. Yes.

Q. All right. To what extent?

A. When speaking of the entire group's operations, that is, the wide field of the business as the group does it entirely; but not as to specifically the particular fields that each particular company specializes in.

Q. All right. Has the term "American Associated" acquired any common usage that you have been able to ascertain?

Mr. Rowe: Just a moment. I will object to that upon the ground it calls for the opinion and conclusion of the witness. [130]

(Testimony of Mark A. Wells.)

The Court: I think so, Mr. Stanbury. I think you had better ask with regard to the insurance field, and then as to others if you desire.

Mr. Stanbury: All right. I will get at it this way:

Q. (By Mr. Stanbury): Since the acquisition of the Associated Companies by the American Auto has the term "American Auto" gone out of use in conversation either among insurance people or lay people who know of the companies at all, as far as you know?

Mr. Rowe: I object to it on the ground it calls for hearsay. A. Not that I know.

The Court: What is the objection?

(The objection was read by the reporter.)

Mr. Rowe: I move the answer be stricken.

The Court: It may go out. [131]

* * *

Q. Within the insurance industry itself, Mr. Wells, can you tell us whether or not at the present time the plaintiff companies are commonly referred to as "American Auto" or something else?

A. American Auto.

Q. To what extent have you had any occasion, let us say within the last year, to ever hear any lay person outside the industry say anything about these plaintiff companies, if you have?

A. I don't recall any specific time within the realms of my capacity in the business. I have had

(Testimony of Mark A. Wells.)

the name of the company referred to in my private life, let's say, and the question asked of me as to what my opinion was of that particular company.

Q. As an insurance editor do people talk to you, lay people, talk to you about your opinion of different [132] insurance companies?

A. Quite frequently.

Q. Can you tell us whether or not people who speak to you in that connection do or do not have any general way of referring to these plaintiff companies?

A. It could be either American Auto or American Automobile.

Mr. Rowe: Just a moment. I think that calls for a yes or no answer.

The Court: I think the answer really shows he is really not qualified to answer the question generally, Mr. Stanbury.

Mr. Stanbury: All right.

Q. (By Mr. Stanbury): Is there any other company or companies that you ever heard of referred to as American Auto? A. No.

Q. Have you ever heard of the American Automobile Association referred to as American Auto or American Automobile? A. No.

Mr. Stanbury Cross-examine, if you wish, sir.

The Court: Did you ever hear it referred to as American Auto Club?

The Witness: No. I can tell you how it is referred to.

(Testimony of Mark A. Wells.)

The Court: We have had testimony here of Three A's and [133] Triple A and AAA.

The Witness: Yes, that is the way it is referred to.

Cross-Examination

By Mr. Rowe:

Q. Mr. Wells, this Insurance Journal is what is commonly known as a trade journal, is it not?

A. It is a trade insurance newspaper.

Q. Trade and insurance newspaper?

A. Trade insurance newspaper.

Q. And is published how frequently?

A. Published weekly.

Q. And is circulated among the insurance companies and firms and agents and brokers of Southern California? A. Yes.

Q. Have you ever heard of the plaintiff company, American Automobile Insurance Company, referred to as American Automobile Company?

A. No.

Q. Have you ever heard either of the plaintiff companies referred to as American Automobile Insurance Company?

A. Yes, American Automboile Insurance Company.

Q. You have? A. Yes.

Q. And that reference has been made to it by people, shall we say, in the trade, that is, the insurance field. [134]

A. Well, may I explain that?

(Testimony of Mark A. Wells.)

Q. Certainly.

A. The reason for the adaptation of a colloquial in the business is because of the fact that there are many corporations doing business in the insurance business. That is why we refer to the company of the Travelers, not the Travelers Fire Insurance Company or the Travelers Indemnity Company, or the Travelers Life Insurance Company, but rather the Travelers.

Mr. Rowe: I think he is going a little beyond my question, your Honor.

The Court: You go ahead and finish, and then you may move to strike it out. Have you finished?

The Witness: No. I was going to say you were attaching the name "Insurance Company." Every insurance company has either "Insurance Company" or "Assurance Company," or something of that character attached to it. So, for the purposes of close association——

The Court: I think you are going beyond the question now.

Mr. Rowe: Then I assume the entire answer may be stricken, your Honor?

The Court: No; just the last part, the very last part.

Q. (By Mr. Rowe): Is that a frequent occurence that you hear of the plaintiff company referred to in that fashion? [135] A. In the business?

Q. Yes. A. No.

Q. In discussing the company with lay people,

(Testimony of Mark A. Wells.)

if you have ever discussed it with lay people, have you heard it referred to as American Automobile Insurance Company? A. No.

Q. You are not an insurance agent, yourself?

A. No.

Q. And you represent no company?

A. No.

Q. You are familiar with the fact, are you not, that since 1944 the advertisement material that American Associated Insurance Companies have placed in your Journal follows, generally speaking, the arrangement set up here?

The Court: I do not think that was gone into on direct examination.

Mr. Rowe: All right. I have no further questions. [136]

* * *

ROBERT J. WHITE

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. Mr. White, what is your occupation, sir?

A. Insurance agent.

Q. How long have you been an insurance agent?

A. Since 1936—'32. Sixteen years.

Q. I believe you also are past president of the Insurance Association of Los Angeles?

(Testimony of Robert J. White.)

A. That is correct.

Q. And you are a director of that at the present time? A. That's right. [139]

Q. Are you the chairman of the Educational Committee of the California State Insurance Agents Association, or last year were you?

A. Last year I was.

Q. One of the companies with which you have an agency contract is the American Automobile Insurance Company, I believe?

A. That is correct.

Q. Do you have occasion to talk about that company with members of the insurance profession? A. I do.

Q. Do you have occasion to talk about that company with members of the public?

A. Yes, sir.

Q. Under what circumstances?

A. Discussing insurance policies as to where their coverage may be placed.

Q. Do you have anything to do with the handling of claims? A. Yes, sir.

Q. Do you have a reasonably accurate idea of how many claimants, either assureds or third-party claimants you come in contact with in the course of a year?

A. Well, in our office it would be probably somewhere in the neighborhood of about 200, I would say, for this [140] company.

Q. Can you tell us whether or not among the people with whom you have had occasion to discuss

(Testimony of Robert J. White.)

these plaintiff companies there is any nickname or common nickname by which they are referred?

Mr. Rowe: Just a moment. Is this to his reference or their reference?

Mr. Stanbury: I am referring to the people with whom he deals, those people who have been generally described in his testimony.

Q. (By Mr. Stanbury): Do you remember the question?

A. Yes. It is usually referred to as American Auto.

Q. Is there any other insurance company or any other association or organization of any kind that you have ever heard of which is known as American Automobile or American Auto? A. No, sir.

Q. You are familiar with the American Automobile Association, are you not? A. Yes.

Q. Have you ever heard anybody refer to that organization as either the American Automobile or the American Auto? A. I never have.

Q. Have you in the course of your work seen—without taking time to study all of this matter which composes [141] Exhibit 8 in detail, can you tell us whether or not you have ever seen any of that material? A. Yes, I have.

Q. Have you ever sent any of that out to the public?

A. Yes, I have sent quite a bit of it out.

Q. When you say "quite a bit" what do you mean?

(Testimony of Robert J. White.)

A. Well, we follow the practice in our office of using some kind of material of this kind as envelope stuffers in practically every piece of mail that leaves the office, and we use this company's material to a large extent.

Q. In the course of your business, then, you have sent out various items from this composite that is known as Exhibit 8 here? A. Yes, sir.

Mr. Stanbury: Cross-examine, Mr. Rowe.

Well, the witness is now identifying to me particular pieces that he has used, but I am not interested in that.

Cross-Examination

By Mr. Rowe:

Q. Are you using any of the documents now to which you have referred from Exhibit 8?

A. Yes, sir.

Q. Which one?

A. We use this one here, their form No. 25025.

Q. This is the only one that you are using now?

A. No. We use others, too, but I see that one right on the top. We use quite a bit of that one, because it is quite clear.

Q. Do you see any others that you are presently using?

A. I don't know whether we have any more of those left, but we have used them. There were a series of similar items to this that we have used.

Q. I would like you to identify any others that are in actual use now.

(Testimony of Robert J. White.)

A. I would have to check my supplies at my office, Mr. Rowe.

Q. Are you unable to recognize from the documents in front of you those particular ones that you use?

A. We have some now that we are using now that are not here. They are more up to date as to this contact, particularly.

Q. Will you supply me with some of those if I get some one to your office to pick them up?

A. Yes, sir.

Mr. Stanbury: I expect some here before the morning is over, but not from this gentleman.

Mr. Rowe: That will be fine.

Mr. Stanbury: Pardon me. I will have to correct that statement. The material that is on the way here this morning is material currently being printed. Leftover supplies [143] of previous printing, I have not. That would have to come from this witness.

Mr. Rowe: From Plaintiffs' Exhibit 8, which consists of a great number of folders, this witness has identified two folders which he states are now in use by him as an insurance agent, and I would like to have these two marked with some separate identification as having been identified by this particular witness.

The Court: Let them be marked as Defendant's Exhibit F and Defendant's Exhibit G, for identification.

(Testimony of Robert J. White.)

Mr. Rowe: That will be satisfactory, your Honor.

(The documents referred to were marked Defendant's Exhibit F, and Defendant's Exhibit G, for identification.)

Q. (By Mr. Rowe): Mr. White, have you ever heard the American Automobile Insurance Company and its associated companies referred to as American Associated Insurance Companies or American Associated? A. Occasionally.

Q. Have you seen advertising within the last few years of these companies under that name?

A. Yes, sir.

Q. In discussing these companies or the plaintiff companies with men in your business, have you heard them referred to as American Associated?

A. Very rarely.

Q. Isn't it a fact that in the insurance business when one or more companies have common ownership it is customary for them to advertise under groups? A. That is correct.

Q. And isn't it a fact that over a period of time they become known as groups; that is, for example, the Loyalty group? A. Yes, sir .

Q. How many other groups can you name for me?

A. Well, there is the Loyalty group, the Home group, Phoenix, Connecticut group, I believe you call U.S.F.&G. a group. There are others.

Q. There are a great number. There is an American Four group? A. Yes, sir.

(Testimony of Robert J. White.)

Q. Which is advertised as American Four?

A. That is correct.

Q. I happen to have here a publication, Underwriter's Report, dated October 25, 1948, on the front sheet of which appears an advertisement, "Convention Greeting, Glen Falls Group."

Mr. Stanbury: Objected to as immaterial as to how Glen Falls refer to themselves.

The Court: I think he is just referring to them as a [145] matter of example.

Mr. Rowe: That is correct.

The Court: A short reference is all right, but don't take up too much time on it. The witness has already testified that there are groups.

Q. (By Mr. Rowe): This is typical of the thing you are discussing? A. Similar to it.

Mr. Stanbury: The same objection, your Honor, that it is immaterial.

The Court: It has been answered.

Q. (By Mr. Rowe): Mr. White, are you a chairman of the Educational Committee of the Insurance Association of Los Angeles? A. No, sir.

Q. Isn't that what your testimony was?

A. No, sir. I was chairman of the State Association, Educational Committee, last year.

Q. What is the function of that committee?

A. To provide—stimulate educational programs throughout the local member associations to raise the standard of the agency ranks.

Q. That is to train insurance agents to as nearly as possible a professional capacity?

(Testimony of Robert J. White.)

A. That is correct. [146]

Q. Insurance agents such as you are consider themselves as occupying at least a semi-professional capacity? A. We strive to.

Q. In that capacity you are familiar with all the various companies which write insurance?

A. With a good many of them, yes, sir.

Q. You know generally that there are many names of insurance companies which are similar to each other? A. There is some similarity.

Q. There is some, is there not? A. Yes.

Q. There is more than some, isn't that true?

A. Yes, perhaps so.

Q. Is there any part of your training of your men to teach them to distinguish between companies?

Mr. Stanbury: Objected to, your Honor, as not proper cross-examination.

The Court: It is overruled.

A. We endeavor to teach students to distinguish between the types of companies.

Q. (By Mr. Rowe): Well, as a matter of fact, there is no confusion to speak of in the insurance field by reason of this name similarity, isn't that true?

Mr. Stanbury: The same objection, if your Honor please, that it is not proper cross-examination. [147]

* * *

The Court: The objection is sustained.

Q. (By Mr. Rowe): You testified, Mr. White,

(Testimony of Robert J. White.)

that you have an agency contract with the American Automobile Insurance Company? A. Yes, sir.

Q. Is it one of the conditions of that contract that your insurance business belongs to you and not to the company?

Mr. Stanbury: Objected to as not proper cross-examination, and not the best evidence, and immaterial, your Honor.

Mr. Rowe: He says he has got a contract, your Honor.

The Court: The objection is sustained. It isn't the best evidence.

Mr. Rowe: Do you have a copy of your form contract, Mr. Sessions?

Mr. Sessions: No, I don't.

Q. (By Mr. Rowe): You have, Mr. White, a group of persons whom you serve as your clientele, is that correct? A. Yes, sir.

Q. You obtained the patronage of those persons by [149] reason of the services you render, do you not? A. To a large extent.

Mr. Stanbury: If your Honor please, the same objection that it is not proper cross-examination?

The Court: It is overruled.

* * *

Q. (By Mr. Rowe): When the ordinary individual or any individual wants to place insurance through you in some company which you represent, or wants to place it through you, if I may restate the question that way, isn't it a fact that you desig-

(Testimony of Robert J. White.)

nate the company in which the insurance is to go in a great majority of the instances?

* * *

A. Yes, that is correct.

Q. (By Mr. Rowe): The average individual calls you, does he not, and simply says, "I want coverage of so much on [150] my house, my car," whatever it may be?

A. That is the customary practice.

Q. And that is true in the casualty and in the fire field, particularly, isn't that right?

A. That is right.

Q. In the life field the situation is different?

The Court: We are not concerned with life insurance.

Mr. Rowe: I withdraw the question. No further questions. [151]

* * *

ELMER WISSMANN

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. Mr. Wissmann, what is your occupation, sir?

A. I am insurance manager at Barker Brothers.

Q. You are not an insurance agent or broker?

A. I am not.

Q. Are you an assured of the American Automobile Insurance Company? A. I am.

Q. That is personally? A. Yes, sir.

(Testimony of Elmer Wissmann.)

Q. For any length of time was Barker Brothers an assured of that company?

A. Yes, from 1924, to my knowledge, to approximately 1939, 1940, I can't tell exactly.

Q. Do you have anything to do in a private capacity with the automobile insurance problems of other employees at Barker Brothers?

A. Because of my long tenure in office as insurance manager many of the employees, especially those who have been [153] with us over a long period of time, will come to me for advice; if they are in an accident, or if they want any advice regarding insurance, they will come to me for that advice.

Q. Are any of them assureds of the American Automobile Insurance Company?

A. Yes, quite a number of them, especially those who have been in our employ for a long time. We had our fleet with the American Auto for many years, and as a result a number of the employees took their policies out many years ago and have continued.

Q. Have you had occasion to talk with lay people—when I say "lay" I mean non-insurance people—employed by Barker Brothers concerning the American Automobile Insurance Company?

A. Yes, I have talked to them.

Q. Infrequently or frequently, or what?

A. Rather infrequently. I suppose maybe on an average two or three a week or a month. There is no particular time.

(Testimony of Elmer Wissmann.)

Q. Have you noticed whether or not those persons have any designation for the American Automobile Insurance Company, other than the full name of that company, when they refer to it?

A. We always have referred to it as the American Auto. We never say "American Auto Insurance." It seems [154] superfluous.

Mr. Rowe: I didn't hear the last statement.

The Court: Read the answer.

(The answer was read by the reporter.)

Mr. Rowe: I move to strike the last part.

Mr. Stanbury: "It seems superfluous"?

Mr. Rowe: Yes.

Mr. Stanbury: I have no objection to that going out.

The Court: It may go out.

Q. (By Mr. Stanbury): Have you had any conversation with any person in which the terms "American Associated" have been used in referring to the plaintiff company or companies?

A. No, we never refer to "American Associated." I presume because of the long standing of our insurance relations with the American Auto, back from 1924, as far as I am concerned.

Q. Have you ever heard of an organization other than the plaintiff companies here, the American Automobile Insurance Company and the American Automobile Fire Insurance Company, referred to as American Automobile or American Auto?

A. I don't quite get your question, Mr. Stanbury.

(Testimony of Elmer Wissmann.)

Q. Have you heard any other organization, other than these plaintiff companies, referred to as American Automobile or American Auto? [155]

A. No, I have not.

Mr. Stanbury: Cross-examine, Mr. Rowe.

Cross-Examination

By Mr. Rowe:

Q. Mr. Wissmann, I understood you to say that Barker Brothers has been an assured of the American Automobile Insurance Company from 1924 to 1940?

A. Yes, approximately that time. I am not certain of the 1940, but as a firm we had a fleet of over 100 pieces of equipment and we were insured with the American Auto during that period of time.

Q. At that time and now you were employed by Barker Brothers as their insurance expert?

A. Insurance manager.

Q. That is, you direct the taking out of all the insurance that Barker Brothers takes?

A. That is right.

Q. Have you any connection with Personnel Department of Barker Brothers?

A. Not directly, no. I work in connection with them, because my work ties in with Personnel.

Q. Employees of Barker Brothers know you over this period of years in the capacity that you are employed by that company? A. Yes, they do.

Q. And it is for that reason they come to you regarding insurance matters?

(Testimony of Elmer Wissmann.)

A. Yes. They are referred by other employees, if they have an accident, or if they want anything, they tell them, "Maybe you had better see Mr. Wissmann, maybe he can help you."

Q. May I ask you did American Automobile Insurance Company offer policies to employees of Barker Brothers on a fleet basis or any sort of group basis, or anything of that nature?

A. They do not.

Q. Do you have many employees there who come to you and say, "I want to put my insurance in American Automobile Insurance Company"?

A. I would be quite surprised if they were to. They come up and they may ask me who would be a good company, and I tell them about the Auto Club and the Farmers. I say, "Don't you have a broker?" and if they say, "Yes," I say, "Well, you had better consult your broker."

Q. In the absence of consulting a broker they come to you and ask you for advice about, "In what company should I put my insurance?" Is that substantially correct?

A. If they were to ask——

Q. I say do they?

A. Once in a great while. Very infrequently.

Q. Then, do they come to you after their insurance has been placed for them by other agents or brokers?

A. They don't say whether they have or not. I ask them if they have a broker, and I tell them that that is who they should contact.

(Testimony of Elmer Wissmann.)

Q. I understood you to say on your direct examination that many of the employees at Barker Brothers come to you for advice about insurance policies?

A. Yes.

Q. What do you mean by that?

A. They might ask me about life insurance, they might ask me about an accident that they have been in, or maybe some member of the family who might have been injured, and what would I suggest they do.

Q. When that comes up in the case, for example of an injury or perhaps an accident in which the employee has been involved, do you ordinarily inquire in what company the employee has his insurance?

A. No, I am not concerned, because they have no insurance—that is, they are the injured person, there would be no insurance company involved.

Q. Then what is the occasion for you discussing American Automobile Insurance Company with these various employees?

A. I don't discuss American Auto Insurance with them [158] unless they have insurance. If they have insurance with the American Auto they come up and say, "Could you call the broker for me?" They have been doing that, let us say, for the last 20 or 25 years.

Q. And if they came up and said, "I have had an accident," or "I have a claim," would you say, "In what company do you have your insurance?"

A. No.

(Testimony of Elmer Wissmann.)

Q. How would you know what broker to call?

A. That is only on ordering insurance, not as far as a claim is concerned.

The Court: I think you are talking about two different things.

Mr. Rowe: We may be.

Q. (By Mr. Rowe): Let's confine ourselves to employees who want insurance, let's just discuss them for a moment. You have some employees there who come to you to ask advice about the placing of insurance, is that correct?

A. Yes, what type of insurance to buy, and possibly where to order it.

Q. Do you advise the employee where it should be placed? A. No.

Q. What do you do if they ask you where it should be placed? [159]

A. I ask them who their broker is, to consult their broker. I am not selling insurance and I am not directing anybody to any broker or any company.

Q. So with those people you would have no occasion to discuss American Automobile Insurance Company or any other company, is that correct?

A. That is correct.

Q. Is that the great number of your contacts with these employees about insurance, are they of that nature?

A. No. Most of my contacts are regarding an accident and what I would suggest they do. Once in a great while, maybe—I would say in a year's

(Testimony of Elmer Wissmann.)

time—I haven't given it any thought, maybe 10, 15, maybe not that many people come to me and say, "Where should I buy my insurance? What kind should I have, and what would you suggest?"

Q. We were talking a second ago about claims; are we back to buying now?

The Court: Never mind about getting back to buying. Have you finished cross-examining about the claims?

Mr. Rowe: No.

The Court: Just go right ahead.

Q. (By Mr. Rowe): My question to you was this: Referring now to the employees of Barker Brothers who may come in to discuss a possible claim, either against them or in their favor, do you first ask each of those employees [160] in what company his insurance is?

A. No, I am not in the least bit concerned.

Q. What do you tell them?

A. If they say they have been injured, I tell them to consult a physician. I did that yesterday with a lady who had suffered an accident, and she wanted to know just what she should do. I said, "If you are bothered with this injury you had better consult with a physician."

Q. Under what circumstances would you discuss the name of an insurance company with any of the employees of Barker Brothers?

A. Are we still talking about claims, may I ask?

Q. Yes.

(Testimony of Elmer Wissmann.)

A. I would never discuss an insurance company about a claim.

Q. And you would never discuss the name of a company or anything else? A. No, sir.

Q. Let's go back to the other thing, about the possibility of buying insurance. I understood you to say if an employee of Barker Brothers came to talk to you about buying insurance you would refer him to a broker?

A. To his broker. I say, "Do you have an insurance broker?" And if they say, "Yes,"—they come to me to find out what type of insurance I would recommend, not the [161] company, but the type of insurance.

Q. They never suggest the company to you?

A. No, there is no object. If they ask me: What do you think of a certain company? I will say, "Well, they are all right. As far as I know they are all right." I don't like to get into those discussions with them about companies, because I am far too busy.

Q. What I am trying to find out is what is the occasion for you to discuss the name American Automobile Insurance Company, or any variation of that name, with an employee of Barker Brothers?

A. Many employees who have been with us over a long period of time have been insured with the American Auto, and through the years they have called me up or come up and say, "Will you just renew that insurance with the American Auto," because I am in contact with that office on firm busi-

(Testimony of Elmer Wissmann.)

ness all the time. They happen to know me peronally over maybe 15, 20, 25 years. I handle no insurance for them, but I will phone, as I am calling this particular broker who handles our firm business, and I will say, "By the way, Mary Jones was up and she wants her insurance renewed."

Q. In discussing the insurance with those people you refer to American Automobile Insurance Company as American Auto? [162]

A. We always say "American Auto." We never say "American Automobile Insurance Company."

Q. You say that in your firm since you have had the fleet policy?

A. We have always called it just American Auto.

Q. As I understand it, this testimony you have just given about American Auto, in discussing it with the employees, has no relation to the purchase of any insurance? A. None whatever.

Mr. Rowe: No further questions.

* * *

H. PERK, JR.

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Stanbury:

Q. Mr. Perk, you are an insurance agent, are you not, sir? A. Yes, sir.

Q. How long have you been such?

(Testimony of H. Perk, Jr.)

A. Since 1912.

Q. And you have held various offices in the national, [163] local and state association, I believe?

A. Yes, sir.

Q. Are you an agent of these two plaintiff companies, American Automobile Insurance Company and American Automobile Fire Insurance Company? A. We are not an agent.

Q. Do you place business with them?

A. We do.

Q. You are a broker, then, are you?

A. Yes, sir.

Q. As far as the American Auto Companies are concerned, you are a broker, is that correct?

A. That is correct.

Q. Over how long a period of time have you placed assureds with the American Automobile Insurance Company?

A. Since the early '20s; about 1921.

Q. Have you had occasion in the course of your business as an insurance agent and broker to refer to these plaintiff companies? A. Yes, sir.

Q. And to hear others refer to them?

A. Yes, sir.

Q. Is there any shortened appellation or nickname commonly used by people to whom you have talked in the insurance business when referring informally to these [164] plaintiff companies?

A. There is.

Q. And what is that appellation?

A. American Auto.

(Testimony of H. Perk, Jr.)

Q. Do you know of any other insurance company or any other organization of any kind that is referred to as American Automobile or American Auto, other than these plaintiff companies?

A. I do not.

Q. Have you ever heard the American Automobile Association referred to as American Automobile or as American Auto by any person?

A. I have not.

Q. As an insurance broker have you ever distributed to clients of yours, or to anyone else, any of the pamphlets represented in this group here which is plaintiffs' Exhibit 8? Mr. Perk, to save time, are you finding any or not?

A. Yes, these that I am selecting.

Q. You are selecting a group, and I have interrupted you in the middle of it, but I take it you are selecting samples of those that you have distributed from your office? A. That is correct.

Q. And in what quantities, approximately?

A. Well, we generally use various of these circulars in our mail matter. We use them as stuffers, as advertising [165] material, and for information to the public.

Q. Do you know whether or not you have any of those at the present time, or not? Are you able to give an accurate answer to that question?

A. Do you mean of this particular——

Q. Of any of those particular types now, do you know whether you have or not?

(Testimony of H. Perk, Jr.)

A. No, I don't think we have now. We have the revised form of these items.

Q. Up to about what time were you distributing these very kinds that you are looking at now?

A. Up to the time the American Auto acquired ownership of the Associated Indemnity.

Mr. Stanbury: Cross-examine, Mr. Rowe.

Cross-Examination

By Mr. Rowe:

Q. May I see the pamphlets you have picked out? A. That group (indicating).

Mr. Rowe: Mr. Stanbury, I think I could save some time if I might ask you this question. It was my understanding that these pamphlets which form Plaintiffs' Exhibit 8 were not sent out by the company to agents or brokers for distribution to the public after 1943. Is that correct?

Mr. Stanbury: After 1943, was it, or 1944?

Mr. Rowe: '43, I think. [166]

Mr. Stanbury: That statement is correct, unless I correct it before this case is over. I believe that is so. I am investigating it again this morning.

Mr. Rowe: That was the stipulation that went with the exhibit, and if that is the case I don't have to cross-examine on it at all.

Mr. Stanbury: The court may take it for granted that that is correct, unless evidence to the contrary, that I don't expect, is introduced. I heard something this morning which raised a question in my mind, and that is what I am investigating.

(Testimony of H. Perk, Jr.)

Mr. Rowe: One of your witnesses raised a grave question in my mind.

Mr. Stanbury: He is the one that I got my information from. But the court may take it for granted unless I prove to the contrary those particular issues stopped in 1943.

The Court: That is referring to part of——

Mr. Rowe: Every pamphlet, your Honor, that forms Plaintiffs' Exhibit 8.

Mr. Stanbury: That's right.

Q. (By Mr. Rowe): Calling your attention to these six pamphlets from Plaintiffs' Exhibit 8, I understood you to say these have not been sent out to your customers or clientele for a number of years, is that correct?

A. That is correct. We did use up all of the supplies [167] of the particular form that we had, even after the company acquired the Associated Indemnity.

Q. But you have completed using those?

A. When those were used up then we secured the revised issue of the pamphlets published by that company.

Q. Mr. Perk, as a broker you regard your clients as your own, do you not? A. Correct.

Q. And you maintain those clients by reason of the service that you render?

A. That's right.

Q. And the service that you render consists in placing insurance for them and in rendering help

(Testimony of H. Perk, Jr.)

to them in all ways possible in connection with any claims which may arise under that insurance?

A. Correct.

Q. In the selection of a company in which insurance is placed by you, isn't it a fact that in the vast majority of the cases you select the company?

Mr. Stanbury: That is objected to as not proper cross-examination, your Honor, and also immaterial.

Mr. Rowe: May I be heard?

The Court: Wait just a moment.

I believe it is, Mr. Stanbury, in view of the fact that this witness testified that he sent out some of these pamphlets [168] for the purpose of conveying information to his clients, I think it is cross-examination. It is overruled.

Q. (By Mr. Rowe): Is that true, Mr. Perk?

A. Yes, we make the choice of the company. The public generally will object to some company they don't want to be placed with.

Q. I beg your pardon, sir?

The Court: Read the answer.

(The answer was read.)

Q. (By Mr. Rowe): Is that a fair statement, the public generally will object to some company they don't want to be placed with?

A. When I said "the public" I meant——

Mr. Stanbury: Just a moment. I'm objecting to that, your Honor, as immaterial, incompetent, what the public generally does.

The Court: This witness gave the answer, and I

(Testimony of H. Perk, Jr.)

think the objection should be overruled so that it may be understood.

The Witness: I started to explain the answer.

The Court: You may go ahead, Mr. Perk.

The Witness: May I explain the answer, your Honor?

The Court: Yes, you may.

The Witness: When I used the term "general public" I mean prospects for insurance that we were then interested [169] in.

Q. (By Mr. Rowe): You represent as a broker—withdraw the question.

The Court: As I understood his answer, it was, in substance, unless one of his prospective clients objected to some particular insurance company having the client's business, that they would leave it entirely to you and you would select the company, is that correct?

The Witness: That is correct.

The Court: Would that happen frequently that an objection would be made?

The Witness: It is not frequent, but it does happen.

The Court: Go ahead, Mr. Rowe.

Q. (By Mr. Rowe): Would you say it happened in as many as five per cent of your customers?

A. No. It wouldn't be one per cent.

Mr. Rowe: No further questions.

HAROLD C. GILLESPIE

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows: [170]

Direct Examination

By Mr. Stanbury:

Q. Mr. Gillespie, what is your occupation, sir?

A. Manager, Los Angeles Branch Office, United States Fidelity & Guaranty Company.

Q. That is the company known as the U. S. F. & G.? A. That is correct.

Q. That company is a competitor, I believe, of the American Automobile Insurance Company, the American Automobile Fire Insurance Company, the Associated Indemnity Company, and the Associated Fire and Marine Company, is it not?

A. That is correct.

Q. Do you have any connection at all with these plaintiff companies, which for your precise information are the two American companies—do you have any connection with either of those companies?

A. No connection whatever, except in a competitive way.

Q. How long have you been the manger of the U. S. F. & G. here? A. Since 1929.

Q. And continuously? A. Continuously.

Q. During that time have you had occasion to talk to people in the insurance business here in Los Angeles about [171] these plaintiff companies?

A. Yes.

(Testimony of Harold C. Gillespie.)

Q. And can you tell us whether or not there is in general use some nickname whereby these plaintiff companies are referred to?

A. These companies are always referred to, at least in our experience, as the American Auto.

Q. Do you know of any other organization of any kind anywhere that you have ever heard referred to as American Automobile or as American Auto? A. No.

Q. Do you know the organization known as the American Automobile Association? A. Yes.

Q. Have you ever heard anybody refer to that as either the American Automobile or as the American Auto? A. No.

Mr. Stanbury: Cross-examine, Mr. Rowe.

Cross-Examination

By Mr. Rowe:

Q. Mr. Gillespie, are you aware of the fact that in about 1942 or '43 these two American companies, as Mr. Stanbury described them, bought out two other insurance companies and now operate a group known as American Associated Insurance Companies? [172] A. Yes.

Q. Have you ever heard anyone refer to the companies by that name?

A. Well, I can't recall any specific instance of their being referred to in that fashion. It is always the American Auto in our experience.

Q. You never heard the words "American Associated" used?

(Testimony of Harold C. Gillespie.)

A. I can't recall any specific instance of where I have heard it used.

Q. Can you say that you have never heard it used? A. I wouldn't want to say that.

The Court: That is argumentative.

Mr. Rowe: Withdraw it.

Q. (By Mr. Rowe): Have you seen the advertising under that name?

A. Yes, I have seen it.

Q. Have you had letterheads bearing that name, or letters? A. I don't recall any.

Q. You have had no correspondence with them?

A. We don't have any correspondence with them.

Mr. Rowe: I have no further questions. [173]

JAMES WALLACE

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. Mr. Wallace, what is your occupation, sir?

A. Insurance broker.

Q. How long have you been an insurance broker?

A. Since 1928.

Q. You have your office here in Los Angeles?

A. Yes, in the Barker Building.

Q. Are you an agent of either the American Automobile Insurance Company or the American Automobile Fire Insurance Company?

A. A broker.

Q. That is, you are not an agent?

(Testimony of James Wallace.)

A. Not an agent.

Q. For how long a period of time have you placed assureds with the American Auto Company?

A. I would say approximately 1930.

Q. Since then?

A. Yes, since then.

Q. Continuously? [174] A. Continuously.

Q. Have you had occasion to talk to people, both as assureds and other people engaged in the insurance business, concerning these plaintiff companies?

A. Yes.

Q. And can you tell us whether or not there is in common use any shortened name or nickname by which these companies are known?

A. Yes; American Auto.

Q. Have you ever heard of these companies being referred to in informal conversation as American Associated? A. Seldom.

Q. Since they have been amalgamated can you tell us whether or not the nickname American Auto has gone out of use among the people with whom you converse concerning these companies?

A. No. It is continuously referred to as American Auto.

Q. And have you ever heard of any other organization anywhere that is referred to either as American Automobile or as American Auto?

A. No.

Q. You are familiar with the organization known as the American Automobile Association, are you not? A. Yes. [175]

Q. Can you tell us whether you have ever heard

(Testimony of James Wallace.)

it referred to either as American Automobile or as American Auto? A. Never.

Q. Do you know whether or not the American Automobile Association sells insurance or brokers insurance at least in this locality?

A. No, it does not.

Q. Do you know what outlet, if any, it has in this locality, or what affiliate it has in this locality, if any?

A. You are referring now to the American——

Q. To the AAA.

A. It is an automobile club, a service club for automobiles.

Q. Do you know what its affiliate is in this district, if any? Do you know? A. No.

Mr. Stanbury: All right, sir. No further questions.

Cross-Examination

By Mr. Rowe:

Q. Mr. Wallace, as an insurance broker you have a clientele of your own? A. Yes.

Q. And you place the insurance for that clientele in companies which you choose for the most part? [176] A. Mostly, yes.

Q. In the vast majority of the instances?

A. Yes.

Q. How many companies do you represent?

A. Quite a number. I would say fifteen or twenty.

Q. And you are familiar with——

(Testimony of James Wallace.)

The Court: I understand that he represents these companies.

The Witness: I am a broker for them.

Mr. Rowe: I believe that is right. I misstated it.

Q. (By Mr. Rowe): You place insurance with fifteen or twenty companies? A. Yes.

Q. You don't have an agency with any?

A. With some.

Q. You do have an agency contract with them?

A. Yes.

Q. With what companies do you have an agency contract? A. Employers Liability.

Q. Is that the only one?

A. And then, of course, we have agency contracts with life insurance companies, but that isn't pertinent.

Mr. Rowe: I have no further questions.

Mr. Stanbury: That is all. Thank you, Mr. Wallace. [177]

Mrs. Older, will you step up, please?

MARY E. OLDER

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. Mrs. Older, what is your occupation?

A. I am a chief telephone operator for the American Associated Insurance Company.

(Testimony of Mary E. Older.)

Q. How long have you been such?

A. For five years.

Q. And that is a common switchboard, is it not?

A. Yes, sir, it is.

Q. How do you answer the phone?

A. American Associated.

Mr. Stanbury: This is already in evidence, your Honor, that is, the telephone book, page 33 of the white directory. It has been referred to, and you were to present that, and I was to produce the yellow page.

Your Honor, I can inform the court, then, this is a fact, because it is in evidence: that directly above the "American Auto Ins Co" is "American Auto Assn. Agcy. RIchmond 3111."

Q. (By Mr. Stanbury): Mrs. Older, do you know what that [178] phone number Richmond 3111 is assigned to?

A. That is the Southern California Automobile Club.

Q. And the address given in the book is 2601 South Figueroa; do you know if that is the address of the Automobile Club of Southern California?

A. That is correct.

Q. As a switchboard operator of these plaintiff companies, the Associated Companies, can you tell us whether or not you receive telephone calls from people whom the conversation discloses are intending to reach the Automobile Club of Southern California or the American Automobile Association?

A. Yes, we receive any number of calls.

(Testimony of Mary E. Older.)

Q. I will get to the number in a moment. How frequently does that occur?

A. I would say we average four or five calls a day.

Q. Have you been on duty this morning?

A. Yes.

Q. When did you quit duty this morning?

A. Well, I left the switchboard about five minutes of nine.

Q. Did you have any call for Richmond 3111 this morning?

A. I had a call a quarter of nine for the American Automobile Association. [179]

Q. You might give us an illustration or some illustrations—withdraw that. Is there any general type of inquiry that is made of you by these people?

A. Well, the general——

Mr. Rowe: I object to that upon the ground it is hearsay, your Honor.

The Court: It is sustained.

Mr. Stanbury: No further questions.

Cross-Examination

By Mr. Rowe:

Q. Mrs. Older, you say you have been the chief telephone operator at this American Associated Insurance Company for five years?

A. That is correct.

Q. At any time during the five years have the telephone switchboard operators answered under

(Testimony of Mary E. Older.)

the name "American Auto"? A. Yes, I did.

Q. That is when you first went there?

A. I answered "American Auto" until the two companies merged and we changed our location, we combined the two switchboards, and we changed the answer to "American Associated."

Q. How many calls a day would you say come in over your switchboard? [180]

A. That is pretty difficult. We haven't had a check from the telephone company in quite some time.

Q. Do you recall what your last checks were?

A. We have 24 incoming trunk lines. I would say—I am just guessing, it is impossible to be exact on this, anyway the calls vary depending on busy days and dull days, and so forth, I would say they average from 350 to 500 calls a day.

Q. And you have 24 incoming lines?

A. That is correct.

Q. How many operators?

A. We don't have any outgoing lines, we have what is known as a P A X board, that is, private automatic exchanges; all our outgoing calls the people dial 9 and get a line. We handle incoming calls only.

Q. How many operators do you have?

A. Two regular operators and two relief operators.

Q. So there are two on the board all the time?

A. Yes.

(Testimony of Mary E. Older.)

Q. You would estimate you handle 500 calls a day?

A. Yes, that would be a heavy day; but from 350 to 500, I would say, would be an average.

Mr. Rowe: I have no further questions.

The Court: I want to ask a question, please.

Mrs. Older, when you first went there your answer to calls was that it was American——

The Witness: American Auto.

The Court: Just American Auto?

The Witness: Just American Auto.

The Court: What do you answer now?

The Witness: American Associated.

The Court: When did you change?

The Witness: I think I remember the date. I think it was in '44, July of '44 I believe the two companies merged and we changed our location.

The Court: You hadn't been there more than a year or so then?

The Witness: I had been there about a year and a half.

The Court: That is all.

DON R. SESSIONS

recalled as a witness by the plaintiffs, having been previously sworn, was examined and testified further as follows:

Direct Examination
(Resumed)

By Mr. Stanbury:

Q. Do you have any compiled annual records of how much money the American Auto or American Auto Fire paid out on claims since 1947, Mr. Sessions? [182]

Mr. Rowe: I object to that upon the ground the record is the best evidence.

Mr. Stanbury: I don't understand that, your Honor. I am not asking for the record. I was going to elicit the information about 1947, and as a preliminary explain why I couldn't do it for 1948.

The Court: I think unless you lay a foundation that the objection would be good. If it is a matter of record it should not take very long to lay the foundation.

Mr. Stanbury: All right, your Honor.

The Court: What the court has in mind is, I think it is Section 1855 of the Code of Civil Procedure, Subdivision 5, which states that where there are a number of figures or the records are voluminous, that one who is examining them may state the result without having the records present.

Mr. Stanbury: Yes, sir.

Q. (By Mr. Stanbury): Do you have the rec-

(Testimony of Don R. Sessions.)

ords here in court, Mr. Sessions? A. I do.

Q. All right. Will you get them, then? I didn't know you had them here.

A. I have our local office records.

Q. This record that counsel is examining now, is that of the American Auto Insurance or American Auto Fire Insurance or both combined? [183]

A. Both.

Mr. Rowe: Frankly, it is going to have to be explained before I can understand it.

Q. (By Mr. Stanbury): Do you have a record here showing how much money was paid out to clients in 1947 by the American Automobile Insurance Company alone?

A. I do not. This is combined.

Q. Combined with the American Automobile Fire Insurance Company? A. Correct.

Q. Do you have the figures for those two companies combined, without the Associated being included? Is that correct?

A. That is correct. May I explain that I can separate these as to American Auto Fire and American Auto, first, by the lines.

The Court: You have not been asked to do that yet.

Q. (By Mr. Stanbury): Is there any compiled record yet for a later year, 1948?

A. No, I haven't yet the 1948 record.

Q. So the one you have is the latest?

A. Yes.

(Testimony of Don R. Sessions.)

Q. Have the figures gone up or down for 1948, if you know, over 1947?

Mr. Rowe: Just a moment. [184]

A. I don't know.

The Court: He says he doesn't know.

Q. (By Mr. Stanbury): How much money was paid out by the American Automobile Insurance Company and the American Automobile Fire Insurance Company on claims in 1947?

A. One million four hundred seventy-four thousand——

Mr. Rowe: Just a moment. If that is a matter of record I will object to the question on the ground the record is the best evidence. If that is a record, I object to the question on the ground the proper foundation has not been laid.

Frankly, I may be dull, but I can't understand that sheet.

The Court: You have examined the records, have you? Do you have the records before you?

The Witness: This is the record I received from our claim department.

The Court: Do you understand it?

The Witness: Yes, I do. I can explain it.

The Court: Is this a record that was kept in the regular course of business of your company?

The Witness: Our claim department keeps this record.

The Court: Can you answer the court's question? Of the two companies?

(Testimony of Don R. Sessions.)

The Witness: I don't know that I know what you mean by [185] "regular course of business."

The Court: Mr. Stanbury, the court assumes that you are familiar with the statute.

Mr. Stanbury: I am familiar with the statute, and invoke it habitually. I didn't think this was a matter that was of such vital importance to counsel that there would be any objection, so I didn't expect to introduce the records.

The Court: We have the objection, and we are faced with the objection.

Mr. Rowe: May I make this suggestion, Mr. Stanbury? If we could discuss the thing, perhaps during the noon hour, I am perfectly willing to stipulate to it. I just don't understand the record and I would like to know about it before it goes into evidence.

Mr. Stanbury: I would rather lay the foundation, your Honor.

The Court: Proceed.

Q. (By Mr. Stanbury): Do these plaintiff companies keep records of the money they spend?

A. Yes.

Q. Did they in 1947? A. They did.

Q. Do you pay income taxes?

A. Of course.

Q. Do you make profit and loss statements?

A. They do at the head office.

Q. Is a recordation of the money paid out on claims a matter of which the company keeps accurate records? A. Yes, it is.

(Testimony of Don R. Sessions.)

Q. Is there any part of the business of these plaintiff companies that is set up with employees whose duty it is to keep track of the expenditures made? A. Yes.

Q. Where did you obtain the document you now have?

A. From our claim department manager.

Q. Is that kept in some sort of file?

A. His secretary keeps it.

Q. And that secretary is an employee of the company? A. That's right.

Q. I assume that the plaintiff companies have an elaborate bookkeeping system? A. Yes.

Q. And off the books that are kept does it run off recapitulation of expenditures for claims year by year?

A. They take them off by months, at the end of each month, and then add them up at the end of the year.

The Court: Mr. Stanbury, I think if you would ask the question as is provided in U.S.C.A.—28 U.S.C.A., 695, I believe it is—that it would simplify this. My recollection is that the section provides that a record may be [187] received in evidence if it is shown that it is kept in the regular course of the business of the company, the plaintiff companies, and that it is the regular course of the business to keep such records.

Mr. Stanbury: The reason I didn't ask it was that your Honor asked it.

(Testimony of Don R. Sessions.)

The Court: I didn't ask it fully.

Mr. Stanbury: All right, your Honor.

The Court: I think Mr. Sessions with his business experience should know what the regular course of business is.

Q. (By Mr. Stanbury): Mr. Sessions, is it part of the regular course of business of these plaintiff companies to keep these records of moneys spent on claims? A. It is.

Q. And was the record that you have there now made in the regular course of the business in that connection of these companies?

A. Yes, it was.

The Court: And does the regular course of the business require that such records be kept?

Q. (By Mr. Stanbury): And does the regular course of the business of these plaintiff companies require that you keep these records?

A. We require it for our own information.

Q. Can you answer it yes or no, does [188] the regular course of your business require that you keep a record of the moneys spent on claims?

A. It does for us, yes, sir.

Q. And do you have in your hand one of those records showing the expenditures by the company to claimants in 1947? A. I do.

Mr. Stanbury: All right. Now, if counsel wants to clutter up the record with the document I am ready to put it in. Otherwise I would merely ask him to give the figures.

(Testimony of Don R. Sessions.)

Do you wish it to go in evidence?

Mr. Rowe: I have no desire of either cluttering up the record or prolonging the examination. I was simply shown something that I don't understand and I wanted to have it explained.

Mr. Stanbury: I offer it in evidence, your Honor, as Plaintiffs' next in order.

The Court: Let it be received and marked as Plaintiffs' Exhibit 10.

(The document referred to was marked Plaintiffs' Exhibit 10, and was received in evidence.)

Q. (By Mr. Stanbury): Explaining this record, Mr. Sessions, which figure or figures on it shows the expenditures made by these two plaintiff companies to claimants in 1947?

A. This total, one million—— [189]

Q. Is it the bottom figure in the column over which is printed the word "Paid," is that right, Mr. Sessions? A. That is correct.

Q. What was the sum of money paid out for claims? A. $1,474,340.

Q. Do you have a record made in the regular course of the business of these companies showing to how many claimants that sum of money in the aggregate was paid?

A. This also is on this sheet. Pardon me. We have here only the total of accident claims received for that year. Those are not necessarily the ones that we paid this money to.

(Testimony of Don R. Sessions.)

Q. Then I will ask you if you have a record made in the regular course of the business of these plaintiff companies showing how many claims for damages were received in 1947 against assureds of the company? A. I have.

Q. How many, sir? A. 23,258.

Q. Do you have any other records showing to what percentage of those claimants the money represented by that $1,474,340 was paid?

A. No, I have not.

Q. No record of that here?

A. Not here. [190]

Q. But it would be some part of this twenty-three thousand, or else their predecessors from previous years whose claims have not been adjusted yet? A. Yes.

Q. And I assume some of those twenty-three thousand claimants of 1947 who may not have been settled with until '48, or perhaps not until the present time?

A. Yes, we have this in our reserves.

Q. Do you have forms of policies now currently being used by the plaintiff companies here?

A. Yes, I do.

Q. Will you pick out the current policies, please, sir? A. Yes.

The Court: Court will take a recess for a few minutes.

(A recess was taken.)

(Testimony of Don R. Sessions.)

Q. (By Mr. Stanbury): Have these plaintiff companies done anything to increase their automobile business during recent years?

A. No.

Q. For what reason?

A. For the last three years we have been suffering from high loss ratios and have not tried to develop or increase our automobile insurance business.

Q. Has the company during the last three years or [191] thereabouts done any advertising to your knowledge concerning the acquisition of automobile insurance? A. Not that I recall, no.

Q. Are you able to state now what the future or permanent policy of these companies may be in that connection?

A. Only that we will undoubtedly try to develop it in the future when the proper time arrives.

Q. That is, you can't forecast the future any more than anyone else?

A. Not definitely, no.

Q. What is the actual date when the Associated Indemnity, having been purchased by the American Auto, started doing business together?

A. In Los Angeles our offices were merged on July 1, 1945.

Q. You brought some policy forms that are being used by these plaintiff companies today, have you? A. Yes.

Q. Is any automobile policy put out which has

(Testimony of Don R. Sessions.)

the name of the American Auto Companies and any of the Associated Companies on the policy?

A. We put out none of them here, and there are none that I know of.

Q. Is there any policy that you have seen in any line [192] that has American Asoociated on it, or American Auto and Associated Indemnity, or any combination of American and Associated?

A. No.

Q. That is, the coverages are separate?

A. That is correct.

Q. I believe you told us yesterday which companies carry the automobile insurance?

The Court: He explained all that.

Mr. Stanbury: All right, your Honor. There are a lot of these policies, gentlemen, and they are all available for you to introduce if you wish. There is only one I am interested in. That is this comprehensive personal liability. If you want them all in they certainly should go in.

Mr. Rowe: I would. As a matter of fact, I can cut it to two.

Mr. Stanbury: Let's put them all in.

Mr. Rowe: All right.

The Court: There being no objection, let them be received as one exhibit, which will be Plaintiffs' Exhibit 11.

Mr. Stanbury: All right.

The Clerk: So marked.

(Testimony of Don R. Sessions.)

(The documents referred to were marked plaintiffs' Exhibit 11, and were received in evidence.)

Q. (By Mr. Stanbury): Are each and all of these [193] policies, which are self-explanatory as to their coverage, now currently being issued by these plaintiff companies. A. They are.

Mr. Stanbury: No further questions.

Cross-Examination

By Mr. Rowe:

Q. Mr. Sessions, I show you two policies which form a part of Plaintiffs' Exhibit No. 11, and direct your attention to the last page of those two policies on which appears the emblem which is used by American Associated Insurance Companies, is that correct? A. That's right.

Q. On that emblem appears the words "American Associated Insurance Companies" and the initials which customarily form a part of that emblem?

A. That is correct.

Q. That policy bears the same emblem on the face above the names of the two companies?

A. It does.

Q. And is that one of the policies that are in current use at this time? A. It is.

Q. That is the policy you use for your comprehensive automobile policy?

A. That's right, for individual [194] insurance.

Mr. Rowe: I will ask that that be given some

(Testimony of Don R. Sessions.)

separate identification marks. Perhaps it is sufficiently identified.

Q. (By Mr. Rowe): Directing your attention to this second one which is called a combination automobile policy, that likewise carries the emblem of American Associated Insurance Companies at the top of the front sheet?

A. That is correct.

Q. And the initials? A. Yes.

Q. And also—I presume that is the end of the policy? A. Yes.

Q. At the end of the policy provisions are the names of the two American Automobile companies, and the American Associated Insurance Companies' emblem with the initials?

A. That is correct.

Q. And this policy is captioned Combination Automobile Policy? A. Yes.

Q. Is that the policy that is in current use at this time? A. It is also in current use.

The Court: Mr. Rowe, he stated that all of those forms of policy are in current use.

Mr. Rowe: I was just going to ask him one more question [195] about it.

Q. (By Mr. Rowe): I notice here another policy which is headed "Comprehensive Automobile Liability Policy"; is this the same type of insurance policy as the one I showed you a moment ago called "Comprehensive Automobile Policy"?

A. It is the same type except it is confined to

(Testimony of Don R. Sessions.)

automobile liability, and we use it for commercial fleets.

Q. Commercial fleets? A. Yes.

Q. In other words, the two that I first called to your attention are the policies which you now send to individual assureds, is that correct?

A. For automobile insurance only.

Q. For automobile insurance only?

A. That is correct.

Q. The policies to which I now call your attention under the heading "Comprehensive General Liability Policy, Comprehensive Automobile Liability Policy"——

Mr. Stanbury: There is one missing here.

Q. (By Mr. Rowe, Continuing): ——are used for what purpose?

A. Those are also used for commercial assureds.

Q. Is that fleet coverage?

A. It might be fleets in the case of automobile; in case of general liability, it wouldn't involve any automobile. [196]

Q. What is the difference between those and this last one?

A. This one is what we call a comprehensive personal liability and automobile policy in combination for individual insureds.

Q. I am a little confused. You use them all now——

A. I can help you. These for individuals cover automobiles only. This one for individuals covers

(Testimony of Don R. Sessions.)

the personal liability, residence liability, and general liability for individuals, along with automobile insurance.

Q. I see. I understood you to state that for three or four years past these two companies have made no attempt to secure additional automobile insurance, is that correct?

A. We have made no attempt to increase our writings, yes.

Q. You have been continuing your advertising during that period?

A. We have carried institutional advertising, of course, throughout that period.

Q. I show you the Insurance Journal of November, 1948, and direct your attention to the last sheet. Is that one of your advertisements in connection with automobile insurance? A. It is.

Q. And that advertisement at the bottom in large black [197] letters contains the words "American Associated"? A. It does.

Q. With the same emblem that you had on two of the policies? A. Yes.

Q. And the full names of the company in smaller type at the bottom? A. That is correct.

Mr. Rowe: I would ask to offer just this last sheet in evidence, your Honor, as Defendant's exhibit next in order, and I have a number of them that I intend to put in as part of my case. I think perhaps they should be a single exhibit.

The Court: Is that part of a present exhibit?

(Testimony of Don R. Sessions.)

Mr. Rowe: No. This is new.

The Court: Use your own judgment, Mr. Rowe.

Mr. Rowe: At this time I ask that it be marked as Defendant's Exhibit next in order for purposes of identification.

The Court: Let it be marked as Defendant's Exhibit H for identification.

The Clerk: Defendant's Exhibit H for identification.

Mr. Rowe: Mr. Sessions, the amount of money you quoted a few moments ago as having been paid out to claimants, does that amount represent the cash paid out or the cash [198] plus the reserves which are set aside for claims?

A. The cash only.

Q. Actually the cash paid out? A. Yes.

Q. That is the cash paid out in Southern California?

A. It was paid out in our Los Angeles branch in 1947.

Q. Does that include the San Francisco branch?

A. It does not.

Q. Nor the Portland, nor Seattle?

A. No.

Q. And it is limited to American Automobile Insurance Company and the American Automobile Fire Insurance Company?

A. That is correct.

(Testimony of Don R. Sessions.)

Mr. Rowe: I have no further questions.

Mr. Stanbury: Just one more question.

Redirect Examination

By Mr. Stanbury:

Q. In connection with your auto business, the advertisement counsel has shown you concerns auto insurance; can you tell us, please, whether or not the plaintiff companies have been rejecting automobile insurance applications on any considerable scale during the period of years that you have told us they have not been pushing automobile insurance sales?

A. Well, I can say that we have been restricting our [199] writings as much as possible to our former volume.

Q. Have you cut out any agents in connection with insurance, or any brokers in connection with automobile insurance, or not?

A. That has been necessary where the business has been too unprofitable, yes.

Q. Has that taken place on a minor scale, a large scale, or what?

A. Two or three years ago it was fairly extensive, I guess.

Q. What was fairly extensive two or three years ago?

A. The elimination of unprofitable accounts.

Q. Was that automobile or all lines?

A. That was chiefly automobile.

(Testimony of Don R. Sessions.)

Mr. Stanbury: I have no further questions.

Mr. Rowe: I have just one question along that line.

Recross-Examination

By Mr. Rowe:

Q. While you have been making this conscious attempt to decrease your amount of automobile business, have you concentrated on the other lines which are carried by your other companies?

A. Yes, we have.

Mr. Rowe: That is all, Mr. Sessions.

The Court: You are excused, Mr. Sessions. Step down. [200]

Mr. Stanbury: I am recalling Mr. Muller as an adverse witness.

WALTER MULLER

recalled as a witness by the plaintiffs under Rule 43(b), having been previously sworn, testified further as follows:

Examination

By Mr. Stanbury:

Q. There is one question I forgot to ask you, sir. Before you applied for the name American Auto Club, you knew there was an American Automobile Insurance Company? A. No, sir.

Q. You knew there was a concern listed in both the white and yellow Los Angeles phone books as American Auto Insurance Co., didn't you?

(Testimony of Walter Muller.)

A. No, sir.

Q. I will refresh your memory by your deposition, page 12, taken October 8, 1948, and ask you to read lines 16 to 18 to yourself.

A. Yes, sir.

Q. Have you read it? A. Yes, sir.

Q. "Q. When you took this name did you know that there was listed an American Auto Insurance Co."—Pardon me. I will have to ask you to read back to page 12, line 9 to line 18. Read it all, please. [201] Have you read that?

A. Yes, sir.

Q. "Q. Now, before taking the name 'American Auto Club' did you look in the phone book to see if any other automobile concern was listed as American Auto? A. Sir?

"Mr. Stanbury: Would you read it, please, Mr. Clark.

"(Question read by reporter.)

"A. Yes, sir.

"Q. When you took this name did you know that there was listed an American Auto Insurance Company? A. I probably did."

Now, was that accurate when you gave it?

A. When you asked me that I was thinking in regard to any other auto club.

Q. When you were asked "Did you look in the phone book to see if any other automobile concern was listed as American Auto" and you said "Yes, sir," did you mean you looked in the phone book?

(Testimony of Walter Muller.)

A. I looked in the phone book under the auto clubs.

Q. When you were asked, "Did you know that there was listed an American Auto Insurance Company," and you said, "I probably did," did you mean that you probably did? [202]

A. Your question inferred that there was such a name listed. I never did look under insurance companies to see if there was any other American Auto Club or American Insurance Company listed.

Q. So when you said here: "Q. Did you know there was listed an American Auto Insurance Company?" and you said, "A. I probably did," what did you have in mind?

A. I probably did not, because I never looked under the insurance companies at that time.

The Court: Did you finish, Mr. Muller?

The Witness: Yes.

Q. (By Mr. Stanbury): When you said, "I probably did," what you meant was, "I probably did not," is that it? A. Yes, sir.

Mr. Stanbury: No further questions.

Mr. Rowe: I have no questions.

Mr. Stanbury: That will be all, your Honor, save for a very brief matter. I can easily finish by 12:00. Counsel has looked them over. I have the page that I promised to bring yesterday, except that I thought it better to get the September, 1947, Los Angeles yellow directory in case the thought might arise that perhaps the present name had been

planted on account of this law suit, so I went back to the classified for the previous year, September, 1947, and I will offer page 649, marked in red, as Plaintiffs' [203] next exhibit in order, and I will write at the top that it is 1947, L. A. Classified.

And then lastly, your Honor, I have a number of books from other cities here which are offered merely, certain pages, for the purpose of showing that throughout the country this company is listed both as shown in the books brought by the defendant yesterday and also as in Los Angeles, namely, in many cities, as American Auto Ins. Co. I can make that very rapid, I think.

The Court: Let the offered exhibit be received and marked as Plaintiffs' Exhibit 12.

The Clerk: So marked.

Mr. Stanbury: I will offer the following as a combination exhibit, if there is no objection. They are marked in red. The white Portland directory for June, 1948, "Amer Auto Ins Co."

The Court: Let me make a suggestion, Mr. Stanbury. Mr. Rowe, the court assumes, will not object to it, and will probably desire to offer the parts similar to ones offered in other directories—is that correct, Mr. Rowe?

Mr. Rowe: That is correct.

The Court: Will you gentlemen agree upon all those between now and 2:00 o'clock?

Mr. Rowe: We certainly will.

The Court: And the offer can be made all at one time [204] and it will save a good deal of time.

Mr. Stanbury: All right, sir. It has been done, however, because the defendant put in theirs already, although there is one more in my list.

The Court: I assume that he will want these others to go in.

Mr. Stanbury: All right, sir.

Mr. Rowe: Your Honor, I have a witness here under subpoena from the telephone company that I don't think will take over five minutes. I wonder if I could call him out of order.

The Court: If it won't take more than five minutes you may call him out of order.

(The exhibit marked Plaintiffs' Exhibit 12, for identification, was received in evidence.)

Mr. Rowe: Mr. McCoy, will you take the stand, please?

CHARLES G. McCOY

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rowe:

Q. Will you state your full name, please?

A. Charles G. McCoy.

Q. Your residence?

A. 323 North Sunset Boulevard, Temple City.

Q. What is your occupation?

A. I am a special agent for the Pacific Telephone and Telegraph Company.

(Testimony of Charles G. McCoy.)

Q. Are you here under subpoena today?

A. I am.

Q. Were you asked by us to bring with you all the records of the. Telephone Company pertaining to the listing of American Automobile Insurance Company in the Los Angeles directories?

A. I was.

Q. As far back as you could go? A. I was.

Q. Did you go back and secure the records of the company as far as the records went?

A. I did.

Q. How far do those records go?

A. 1939 in the classified listings and 1940 in the alphabetical section.

Q. After looking at the records which you got out of the files of your company did you check those records against the books for the respective years involved?

A. I checked the directories only for the year of 1940.

Q. Will you please state the documents that you have produced, what they are? [296]

A. We have a transcribed service application card covering service on Trinity 2311, switchboard located at 111 West 7th street, on the ninth floor in Los Angeles. [207]

* * *

DON R. SESSIONS

recalled as a witness by the plaintiffs, having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Stanbury:

Q. You were asked to bring a copy of the agency contracts used by the plaintiff companies?

A. I have it with me.

Mr. Stanbury: I am not introducing this, but I understand you want it. Do you want it to go in evidence?

Mr. Rowe: It apparently is some different type of contract than I had in mind.

Q. (By Mr. Stanbury): You also were going to find out if the companies had put out any pamphlet form of advertising such as found in Exhibit 8, or any successor thereto, since 1944. Have they put out any such advertising at all?

A. I have looked into it and I find we have not.

Q. Either as American Associated, American Auto, or anything else? A. That is correct.

Q. In other words, this type of advertising has been [208] in abeyance since about 1944 in any name?

A. If they order any of that material we will send them whatever supply we have left of the older material, if they want to use it.

Q. Is there any separate corporation which amalgamates all four or any group of the four of these

(Testimony of Don R. Sessions.)

two American Auto Companies or the two Associated Companies?

A. No, there is not, no legal entity by that name.

Q. And neither the American Automobile Insurance Company, nor the American Automobile Fire Insurance Company have been dissolved, have they?

A. They have not.

Q. And in the name of which company is the bank account of the group kept?

A. The bank account here is in the name of the American Automobile Insurance Company.

Q. And has there been any filing of a certificate to do business under a fictitious name, under the name American Associated or any such combined name? A. Not that I know of, no.

Q. Is the Associated Fire and Marine an active company? A. No; that is completely inactive.

Q. The other three companies still are existing as corporations? [209] A. Yes.

Mr. Stanbury: I assume that the corporate existence of these companies can be admitted?

Mr. Rowe: Yes.

Mr. Stanbury: I notice one of the answers raises a jurisdictional point, but I assume that is on a matter of law rather than evidence, is it not?

Mr. Rowe: Not on the matter of evidence.

Mr. Stanbury: Nothing further.

Cross-Examination

By Mr. Rowe:

Q. The name American Associated Insurance

(Testimony of Don R. Sessions.)

Companies is the trade name which these companies have been using since about 1944.

Mr. Stanbury: Just a minute. I am objecting to the form of that question because it assumes that no other name has been used at all. The question is the trade name. It is calling for a conclusion of this witness, as well as being an ambiguous question.

The Court: Is it a trade name?

The Witness: It is a trade name.

Q. (By Mr. Rowe): And is it the trade name of the companies, plaintiffs in this action, as well as the third company which is still actively associated?

The Court: Is it a trade name or the trade name? Do [210] you want to make it the only one?

Mr. Rowe: I was asking whether it was the trade name under which these three companies were operating.

The Court: Do you have one trade name under which they operate?

The Witness: I would say it is a trade name, because we also operate under the individual company names.

Mr. Rowe: I have no further questions.

Mr. Stanbury: That is all, Mr. Sessions. Step down.

Now, with the telephone books, your Honor, they can now go into evidence as one consolidated Exhibit if the court permits, without any delay at all.

The Court: That is, certain pages have been torn from them?

Mr. Stanbury: I am offering references to either of the plaintiff companies from the torn pages of these directories, and I am asking leave to identify them briefly into the record. Shall I pass them to Mr. Enstrom to be passed to the court as I identify them, or not?

The Court: Yes, that is satisfactory.

Mr. Stanbury: All right, your Honor. The first is the Manhattan—that is Manhattan, New York, not California—yellow classified, marked in red "Amer Auto Ins Companies."

The Court: For what year?

Mr. Stanbury: All for 1948, your Honor, the latest ones. [211]

Seattle, the yellow classified, "Amer Auto Ins Co," and in the white "Amer Automobile Ins Co's"; Portland, Oregon, the white, "Amer Auto Ins Co," and in the classified "American Auto Ins Co"; Cleveland, Ohio, in the white, "Amer Auto Ins Co," and in the classified "American Automobile Insurance Co" in heavy black type. Indianapolis, yellow classified, "American Auto Ins Co" in heavy black type, and in the white, Amer Automobile Ins Co"; Boston, in the yellow classified, "American Associated Insurance Companies," in large black type with a large box following it, and thereafter "American Auto Insurance Co" in heavy black type. And in the white for Boston, "Amer Auto Ins Co" followed by seven lines of subheadings which do not mention other companies, but departments, appar-

ently, of the company. Then without obliterating the Western or Northwestern Section—I don't have the copy of the Northeastern here—we can agree, I imagine, that in the current Western Section of the Los Angeles Extended Area there is an entry in the white, there being no classified for that district, "American Auto Ins Co" with the phone number given, and that in the Northwestern Section of the Los Angeles Extended Area, current edition, there is the entry "American Auto Ins Co." Is that so stipulated?

Mr. Rowe: So stipulated.

Mr. Stanbury: And these telephone books belong to the [212] court, so I will give them back to the secretary.

Mr. Rowe: May we, with reference to the Western Section of the telephone book, the one to which you first referred, stipulate that immediately preceding the listing which you referred to appears the listing "American Associated Ins Co's" with the same telephone number?

Mr. Stanbury: I will so stipulate that there is a similar entry in most, although not all of the sheets just introduced; offered for introduction, they have not yet been marked.

The Court: And in this last one, the one for Boston, there appears set out in a space blocked off by a dark line, "American Associated Insurance Companies" immediately under that space "American Auto Insurance Companies."

Mr. Stanbury: Your Honor will find it in all but one or two books. May those be received as the Plaintiffs' next in order?

The Court: They may be received as Plaintiffs' Exhibit 13.

The Clerk: So marked.

(The documents referred to were marked Plaintiffs' Exhibit 13, and were received in evidence.)

Mr. Rowe: In connection with this exhibit, your Honor, I would like to ask that there also be admitted in evidence from the two sheets coming from Boston, Massachusetts, the [213] following listings which appear in the white alphabetical portion: "Amer Auto Accessory Mfg Corp," "Amer Auto Parts," "Amer Auto Parts Co," "Amer Auto Touring Alliance."

The Court: They may be received.

Mr. Rowe: From the Cleveland alphabetical list immediately following the listing to which reference has just been made appears a listing, "Amer Auto The-Overseas Edition." And in the Portland alphabetical portion appears the listing "Amer Auto Sales."

Mr. Stanbury: Then, your Honor, subject to defendant's counsel bringing in that page from the white—that is essential to our case, the white sheet, I want to show where their concern would be listed in connection with ours—subject to introducing the

current page of the Los Angeles white directory which carries the names of these plaintiff companies, we rest your Honor.

Mr. Rowe: Mr. McCoy, will you take the stand again, please?

CHARLES G. McCOY

called as a winess by the defendant, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Rowe:

Q. When we adjourned, Mr. McCoy, I think you were about to identify the records you had brought with you in [214] response to the subpoena which was served upon you. Have you those records?

A. I have.

Q. Will you produce them, please?

You have before you certain ruled white pasteboard papers. I will ask you to state what those documents are.

A. This white card here is what we call a service application card which becomes a part of the permanent record of the telephone company.

Q. Does that card go back to some certain year?

A. This card is dated 4-5-46, at which time it was transcribed from a card dated 9-23-40.

Q. This 9-23-40 is the oldest card you could find?

A. That is the oldest card we have.

(Testimony of Charles G. McCoy.)

Q. Does this card indicate how the subscriber has requested its, his, or her listing in the Los Angeles telephone directory?

A. It indicates the listing as shown in the telephone company directory at the time this card is dated.

Q. So that by a reference to that card can you tell me how in 1940 American or The American Automobile Insurance Company was listed in the Los Angeles telephone directory?

Mr. Stanbury: I am objecting to that, if your Honor please, on the ground that that is not the best evidence. I presume those books are obtainable.

Mr. Rowe: I haven't been able to get them.

Mr. Stanbury: Well, I am objecting to that, because I think that is incompetent and unreliable evidence, if your Honor please, how it was shown in the book from this card.

Mr. Rowe: May I just for the purpose of trying to obviate any delay ask this question:

Q. (By Mr. Rowe): Mr. McCoy——

Mr. Rowe: I think his objection is good, your Honor.

Q. (By Mr. Rowe): Mr. McCoy, have you examined the listing in the Los Angeles telephone book for the year 1940? A. I did.

Q. Does the listing as it appears on this white card compare——

Mr. Stanbury: Just a minute.

(Testimony of Charles G. McCoy.)

Mr. Rowe: He is not going to put the card in. I was just trying to show——

Mr. Stanbury: Pardon me. I interrupted you.

The Court: I don't think Mr. Rowe finished his question.

Mr. Stanbury: I say he hadn't. I interrupted him, and then I kept quiet. I am sorry.

Q. (By Mr. Rowe): Does the card that you have before you indicate correctly the manner in which American Automobile Insurance Company was listed in the telephone book in Los Angeles in 1940? Just answer that yes or no. [216]

A. No.

Mr. Stanbury: It is objected to as not the best evidence. The witness says he has seen that book. It must be in existence.

Mr. Rowe: I just say I haven't got it.

Mr. Stanbury: I submit the best way, your Honor please, to know what the 1940 book shows is to see the 1940 book. I don't want to cause a delay in the trial for such a thing as that. I don't know what the answer is going to be, for that matter.

Mr. Rowe: I can tell you.

Mr. Stanbury: May I ask a few questions on voir dire to straighten this up, your Honor?

The Court: Yes.

Voir Dire Examination

By Mr. Stanbury:

Q. Mr. McCoy, this double card that you have here seems to be concerned with 1940, one item for

(Testimony of Charles G. McCoy.)

1940, which has Day and Night Call on it, one for 1943 that is scratched out——

A. May I——

Q. Just a moment (continuing): Then you have five entries for '45, and then all the rest are 1948. That is correct as far as that part is concerned, isn't it? A. That is correct [217]

Q. Then this other card that you have, this single card, has one entry for 1940?

A. This card was transcribed to this one here (indicating).

The Court: The court will suggest that you withdraw this witness and wait until we have a recess and go over them. It may be that it is a matter that you can agree upon and not take the time trying to figure out what these cards mean at the present time.

Mr. Rowe: Permit me to ask just one other question, then, on another subject, your Honor.

Direct Examination
(Resumed)

By Mr. Rowe:

Q. Mr. McCoy, does the Telephone Company have certain rules and regulations with regard to abbreviations and names that are listed in the telephone books? A. We do.

Q. Are those regulations printed?

A. They are.

Q. Do you have a copy of those regulations with you? A. I do.

(Testimony of Charles G. McCoy.)

Q. Will you produce it, please?

A. (Witness does as requested.)

Mr. Rowe: Would you like to look at this, Mr. Stanbury?

Mr. Stanbury: Yes. I still say that if I have time to [218] confer with you and find out what you are trying to prove maybe we can stipulate to it.

The Court: That is why the court suggested that.

Mr. Rowe: I just hesitate to keep this man. I had him here all yesterday afternoon, and I hesitate to keep him for all this afternoon. Can we confer for a few minutes now, or shall we wait until your Honor has a recess?

The Court: You go ahead and confer privately.

(Slight delay in proceedings.)

Mr. Rowe: Then, may it please the court, subject to Mr. Stanbury's approval this is the stipulation: that the plaintiff company, American Automobile Insurance Company, was listed in the Los Angeles telephone book in 1940 as "Amer Automobile Ins Co." Prior to 1940, that should be. In 1940 the listing was changed to the manner in which it now appears as "American Auto Insurance Co." That the records of the Telephone Company contain no request from the subscriber, American Automobile Insurance Company, to change the listing in the manner I have just indicated. And, further, that the policy or regulations of the Telephone Company, in the absence of any opposition from a subscriber, or

(Testimony of Charles G. McCoy.)

contrary specific request, is to abbreviate the word "Automobile" by using the word "Auto."

Mr. Stanbury: So stipulated.

Mr. Rowe: That is all, Mr. McCoy. [219]

Cross-Examination

By Mr. Stanbury:

Q. In order, Mr. McCoy, to get any listing in the classified, is it necessary to have an application from the subscriber? A. No, it is not.

Q. In order to get heavy type it is necessary for the subscriber to apply, is it not?

A. That is true.

Q. And in order to get a box——

The Court: And an additional charge is made for the heavy type?

The Witness: Yes.

Q. (By Mr. Stanbury): And in order to get a box, that is to say, some writing matter, not an advertisement, but writing matter surrounded by a black line, the subscriber has to order that, is that right? A. That is true.

Q. And pay for it? A. That is true.

Q. So, calling your attention to Plaintiffs' Exhibit 12, the page from the 1947 Los Angeles classified telephone directory, the American Automobile Fire Insurance Company and/or the American Auto Insurance Company, had to order and [220] to pay extra for the large type here "American Auto Fire Insurance Co" and "American Auto Insurance Co," followed by the box, did they not?

(Testimony of Charles G. McCoy.)

A. They would.

Q. And in any of the other classified directories in which the same heavy black type and/or box appears, so far as you know, the same would be true?

A. Are you speaking of the Southern California areas or other cities and states?

Q. Other cities.

A. I could not answer your question.

Q. In the yellow classified the subscriber specifies what language it wants, save for abbreviations that you dictate; that is right so far, is it not?

A. Will you repeat that?

Q. The subscriber tells you what language he wants in his specially paid for classified listing, does he not?

A. Yes, within limitations set down for the directories.

Q. That's right. I am coming to that now. You have certain abbreviations which you prescribe, unless the subscriber objects?

A. Yes. If the subscriber specifically requests the word to be printed in full it would be printed in full.

Q. So if the subscriber objected to "American Auto [221] Insurance Co.," would you spell it "American Automobile Insurance Co"?

A. We would

Q. Do you have any documents there that show whether or not the American Automobile Insurance Company or Fire Insurance Company gave you a

(Testimony of Charles G. McCoy.)

written order for this listing in the Los Angeles classified telephone directory?

A. This is 1946 for the '47 directory.

The Court: You will have to talk louder, Mr. McCoy.

Q. (By Mr. Stanbury): Speak up, Mr. McCoy, please. A. No, I do not.

Q. This sheaf of documents that you have handed me is what?

A. That is the advertising department's copies of advertising contracts or orders which have been received by the advertising department

Q. All right. At the top of this sheet, partly obliterated by papers stuck over it, it says, "Southern California Telephone Company Directory Advertising," does it not? A. I believe so.

Q. At the top of the page after the printed word "Name" is written "American Associated Ins Co" with the "Associated" scratched out and "Auto" written over it, does it not? [222]

A. That is true.

Q. Who did that, do you know?

A. I do not.

Q. All you know is that somebody changed "Associated" to "Auto"? A. That is true.

Q. And that is dated December, 1946, is it not?

A. Right.

Q. And then the next one you have handed me, or that is 1943, that says under "Name" "American Auto Insurance Co"? A. That is correct.

(Testimony of Charles G. McCoy.)

Q. Perhaps the one I just looked at is the latest?

A. I believe it is.

Q. No. Here is a 1948. There the name is "American Auto Insurance Co" typed in, is it not?

A. Yes. That is being removed from the directory showing in this listing here.

Q. Being removed from the directory?

A. Being removed from the directory.

The Court: That is on a slip that has to be filled out if there is a removal, is that it?

The Witness: No, sir. That is a slip which presumably carries all the information regarding additional directory advertising. [223]

The Court: What shows that it is being removed?

The Witness: The fact that this has been scratched out and on this page it has two columns, one showing in, which means service going in, and the other showing out, which shows the service which is being removed.

Q. (By Mr. Stanbury): What is going in?

A. In the succeeding directory.

Q. Pardon me just a moment. Didn't the yellow classified directory come out in this city from the phone company in November, '48, the month just passed? A. That I am not prepared to state.

Q. The document which you say is a removal document, the only date on that is April 30, 1948, is it not? A. That is correct.

Q. I understand now. What is coming out is "American Auto Fire Insurance Company"?

(Testimony of Charles G. McCoy.)

A. That is right.

Q. That is the only removal order you are talking about? A. Apparently.

Q. You have no order to remove "American Auto Insurance Company" or "American Automobile Insurance Company"? A. No.

The Court: That is clear enough.

Q. (By Mr. Stanbury): What are these? These are [224] advertising contracts, aren't they?

A. Yes, they are.

Q. Throughout those contracts, are ones you have with the American Automobile Insurance Company referred to both as "American Automobile Ins Company" and "American Auto Ins Company"?

A. That is correct.

Mr. Stanbury: No further questions.

JOSEPH D. THOMAS

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follws:

Direct Examination

By Mr. Rowe:

Q. What is your residence, Mr. Thomas?

A. 2536 Mount Beacon Terrace, Hollywood, California.

Q. What is your occupation?

A. I am deputy insurance commissioner and attorney at law.

(Testimony of Joseph D. Thomas.)

Q. How long have you been admitted to practice in the State of California?

A. I was admitted in September, 1930. [225]

Q. How long have you been connected with the Insurance Department of the State of California?

A. Since October, 1941.

Q. As the deputy insurance commissioner of the State of California will you state whether or not the Department compiles a list of insurance companies which are qualified to transact business in the State of California?

A. Yes, in two forms. We have our own official record, which is on cards; and then annually we print a list which we give out for public distribution.

Mr. Stanbury: I can save you time by stipulating to that list, if you wish.

Mr. Rowe: All right. I offer in evidence at this time, your Honor, Defendant's next in order, a list of insurance organizations authorized to transact business of insurance in the State of California during 1947, and attached to this is a typewritten statement which shows the date on which certain of the companies were licensed in California.

The Witness: Originally licensed.

Mr. Rowe: Originally licensed in California.

The Court: Let it be received and marked Defendant's Exhibit I.

(The document referred to was marked Defendant's Exhibit I, and was received in evidence.)

(Testimony of Joseph D. Thomas.)

Q. (By Mr. Rowe): Mr. Thomas, does the Department of [226] Insurance of the State of California have a list of the names of persons and companies which are licensed as either agents or brokers in the insurance field in California?

A. Yes. That list is on cards in our office. We publish only the names of brokers. The agents are not compiled and printed as a public document.

Q. At my request have you examined that official record and taken from it a list of the various insurance agents and brokers who are qualified to transact business in that capacity in the State of California whose firm names contain or begin with either the word "American," "Auto," or "Automobile"?

A. Yes, the ones who are corporations. We have no ready manner of compiling a list of the individuals who may be operating under the fictitious names which contain the word "American" or "Automobile."

Mr. Stanbury: May I have the last question and answer read?

(The question and answer thereto were read by the reporter.)

Mr. Rowe: Do you have any objection to this?

Mr. Stanbury: No. I will stipulate to it.

Mr. Rowe: I offer as Defendant's next in order the list in which reference has just been made by the witness.

(Testimony of Joseph D. Thomas.)

The Court: Let it be received and marked as Defendant's [227] Exhibit J.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit J, and was received in evidence.)

Q. (By Mr. Rowe): Mr. Thomas, in your capacity as a deputy insurance commissioner did you have occasion to deal with the application of American Auto Club to become licensed to transact business as a motor club in the State of California?

A. Yes, sir.

Q. Is that club at this time licensed and qualified to transact business as a motor club in the State of California, so far as your department is concerned?

A. Yes, sir, it is licensed and has what we call a certificate of authority, which is the same thing as a license, and so far as we are concerned is fully qualified to lawfully transact a motor club business.

Q. As a part of its application to qualify in that regard, is it or is it not true that the Commissioner of Insurance, or your Department, passes upon the name which any corporation hopes to use in this state?

Mr. Stanbury: That is objected to as immaterial and incompetent, your Honor. I would like to be heard on it if your Honor has any doubt on it.

The Court: What is your position with regard to it? [228]

(Testimony of Joseph D. Thomas.)

Mr. Rowe: My position is this, your Honor: that the fact that either the Secretary of State of the State of California or the Insurance Commissioner has approved a name for use of a corporation in this state is not final. It is a matter which I think should be given weight, and I had hoped to be able to prove by this witness that the name had been passed by him in his capacity as a Deputy Insurance Commissioner, and to continue that proof by showing the practice, administrative practice of that department in passing upon names which are presented to it to be used by corporations in this state.

The Court: He has stated that there has been this certificate issued.

Mr. Rowe: That is correct.

The Court: But the method of arriving at the conclusion which in the opinion of his department justifies the issuance of a certificate, is that material?

Mr. Rowe: I felt that the administrative practice in that regard would be material, your Honor.

Mr. Stanbury: May I be heard, your Honor?

The Court: Yes.

Mr. Stanbury: I submit that it would be an attempt to invade the province of the court by showing what someone else did. Your Honor is familiar with Section 294 of the California Civil Code that says that the act of issuing of [229] the Secretary of State in issuing a corporation articles in a certain

(Testimony of Joseph D. Thomas.)

name does not impair the right of injunction at all. So if this gentleman had arrived at a correct conclusion, and if the position of these plaintiffs is altogether wrong here, how can that help the court charged with the duty of deciding that matter, and if he arrived at a wrong conclusion in the opinion of this court, how is that going to help your Honor?

What they are doing is offering your Honor an example of how someone else's mind worked on something.

The Court: I think the objection should be sustained, and it is.

Q. (By Mr. Rowe): Mr. Thomas, do you have among your records there a letter which was addressed to you by the American Automobile—withdraw that—by the American Associated Insurance Companies?

A. We have a letter dated October 20, 1947, which was addressed to the Insurance Commissioner by the American Associated Companies.

Mr. Rowe: May I ask, Mr. Stanbury, if you will stipulate that this is Mr. Sessions' signature and that he sent that letter?

Mr. Stanbury: Yes, I will stipulate that it may go into evidence, if you wish.

Mr. Rowe: And that the copy attached is the reply? [230]

Mr. Stanbury: I am not stipulating to the reply. I object to that as hearsay.

Mr. Rowe: I will ask that the original letter—you don't mind if I substitute a copy?

(Testimony of Joseph D. Thomas.)

Mr. Stanbury: Not at all.

Mr. Rowe: I will ask that a copy of the original letter be admitted in evidence as Defendant's Exhibit next in order.

The Court: It may be received and marked as Defendant's Exhibit K.

Mr. Rowe: And that I may refer temporarily to this yellow letter which I am holding as Defendant's Exhibit K for identification. I don't know whether it will be admitted or not.

The Court: It wouldn't be K for identification. This last one received is K.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit K, and was received in evidence.)

Mr. Stanbury: Does the court's library have a copy of the Insurance Code?

The Witness: I have a copy right here.

Mr. Stanbury: Thank you.

Mr. Rowe: Mr. Stanbury, may I ask if you will stipulate that this copy that I show you is a letter Mr. Sessions [231] received from the Insurance Commissioner in reply to the letter I just offered in evidence?

Mr. Stanbury: I will so stipulate. I may hereafter withdraw my objection, but at the present time I object to it on the ground that it is incompetent and hearsay.

(Testimony of Joseph D. Thomas.)

Mr. Rowe: I will offer the letter in evidence, your Honor, as being the reply to the letter that was just admitted, and ask that it be marked Defendant's exhibit next in order. And if that is to be admitted I would like to substitute a copy.

Mr. Stanbury: May my objection be deemed made now after the offer? I made it prematurely.

The Court: Yes. The court is considering your objection.

Mr. Stanbury: Thank you, sir.

The Court: The objection is sustained.

Mr. Rowe: This copy, I believe your Honor will permit it to be marked for identification as Defendant's Exhibit——

The Court: Is that a copy of the letter objected to?

Mr. Rowe: Yes.

The Court: Let that be marked as Defendant's Exhibit L, for identification.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit L, for identification.) [232]

Mr. Rowe: You may cross-examine.

Cross-Examination

By Mr. Stanbury:

Q. Pardon me, I didn't catch your name.

A. Joseph Thomas.

Q. Mr. Thomas? A. Yes.

Q. Mr. Thomas, you gentlemen in passing on

(Testimony of Joseph D. Thomas.)

names operate under the section of the Insurance Code having to do with your duties in approving or rejecting names, do you not?

Mr. Rowe: Just a moment. I object to the question as incompetent, irrelevant and immaterial. Withdraw the objection.

The Court: You may answer it.

A. Yes, except that it isn't one section. There are a number of them.

Q. (By Mr. Stanbury): Well, 12194 is one of them, is it not? A. That is correct.

Q. Do you want to see the book, or do you have others in mind?

A. There is one at 820, I believe it is. Maybe I am incorrect in the number.

Q. I think you are. I think you have given me the wrong number in 820. [233]

A. It is 880.

Q. All right. 880, and what other ones, sir, if there are any others?

A. May I answer it this way? There are several different types of insurance organizations, I don't want to thumb through all here to check all of them, but there are probably another three or four sections in relation to specific types of companies that require name approval. 880 is the general one which applies to all except the specialized types of companies, and the other one that you refer to is in the Motor Club Act and applies, of course, to a special type of a company.

(Testimony of Joseph D. Thomas.)

Q. The one section, 12194, to which I refer, is the only section that you deem to apply to names of motor clubs specifically, is it not?

A. That is correct, sir.

Mr. Stanbury: If I may, your Honor, even though the court takes judicial notice of this, it is short, and may I read these two sections briefly?

The Court: Yes.

Mr. Stanbury: Section 880, to which you refer, Mr. Thomas, is as follows:

Under "Article 9" "Registration of Insurers' Names."

"Section 880. [234]

"Except as provided in this article, every insurer shall conduct its business in this State in its own name."

And then Section 12194 is under Part 5 entitled "Motor Clubs." Chapter 2, entitled "Conditions of Doing Business":

"Section 12194. The name of a motor club shall be submitted to the Commissioner for approval pursuant to Section 12221, before the commencement of business under the provisions of this part. The Commissioner may reject any name so submitted when the proposed name would interfere with the transactions of a motor club already doing business in this State or is so similar to one already appropriated as to confuse or is likely to mislead the public in any respect. In such case a name not liable to such objections shall be chosen."

(Testimony of Joseph D. Thomas.)

Did your department refuse permission to the defendant to use the name Auto Club of Hollywood?

A. Yes, we did.

Q. The name with which you deemed that conflicting was the Automobile Club of Southern California?

A. And the Automobile Club of Orange County.

Q. "Automobile Club of Orange County?"

A. Yes.

Q. Those are listed, I presume, here on this list?

A. No. Motor clubs are not on that printed list.

Q. You deemed that "Auto Club of Hollywood" conflicted with "Automobile Club of Orange County" and "Automobile Club of Southern California"?

A. I will answer it this way: Those parties made a formal objection before the Department and we had a hearing, and they introduced several days of testimony to show that both of their names had acquired a secondary meaning of "Auto Club"; and based upon that testimony we refused the name "Auto Club of Hollywood" or "Automobile Club of Hollywood."

Q. But when the protest of the American Automobile Insurance Company reached your office, the matter of the application of the Auto Club, the American Auto Club, had already left your department, had it not?

A. Yes, the name had already been approved.

Q. Without any hearing at which the American

(Testimony of Joseph D. Thomas.)

Automobile Insurance Company or American Automobile Fire Insurance Company were heard or appeared; that is right, is it not?

A. That is correct.

Q. In other words, the first protest that you ever got from these plaintiff companies, whether it be due to [236] laches or otherwise, was after the matter had already cleared and gone out of your office, was it not? A. Yes, that is correct.

Q. It is true, is it not, that there is not in California at the present time any corporation, whether it be a club or an insurance company, which is authorized to engage in insurance of any kind, either as an insurer, broker or agent, which combines in its name the word "American" with "Automobile," or the word "American" with "Auto," other than these two plaintiff companies; that is correct, is it not?

A. It is correct with one exception, which isn't a direct exception.

Q. What is it?

A. That is the American Automobile Association, which is not itself licensed. It only has affiliated organizations which are licensed.

Q. I was coming to that next, sir. If you will answer my present question, there is no company authorized to sell insurance as an insurer, or as a broker or agent, whether it be a company, club, or any other corporation, in California at the present time which combines in its name "American" with

(Testimony of Joseph D. Thomas.)

the word "Auto" or "American" with the word "Automobile," except the three companies here, the two plaintiffs and the American Auto Club, isn't that correct? [237]

A. No, there would be one more exception to it.

Q. What is it?

A. There is no corporate agent or broker using that name, but there might be, and I have no way—and our records don't readily show it—there might be individuals or partnership agents or brokers who are using those names under fictitious names which they had registered.

Q. My question specified corporations because of your previous remark to that effect.

A. I didn't catch that. I am sorry.

Q. So the answer is, is it not, that there is no company answering any part of the description contained in my question which combines the word "American" with "Auto," or "American" with "Automobile," other than the three companies before this court now, isn't that correct?

The Court: When you say "company" you mean corporations?

Mr. Stanbury: Corporations, yes.

A. Yes, that is correct.

Q. (By Mr. Stanbury): And if there is any individual or partnership or other association that is authorized to write insurance in any form, either as an insurer, agent or broker, which combines "American" with "Auto" or "American" with

(Testimony of Joseph D. Thomas.)

"Automobile" in its title, you don't know about it, do you? [238]

A. I don't say that we don't know about it. On their applications they indicate the fictitious names under which they may be operating, but we do not, because of lack of clerical help and one thing and another, lift those things out and make a separate index of them. We use the individual names or the name of the partnership itself for our indexing purposes. So the only way that I could truthfully answer your question would be to go through several thousand applications to pick out these——

The Court: Pardon the interruption. I think the question was personal. If there is, you personally don't know it?

The Witness: No one in our department would.

The Court: I am just asking you.

The Witness: No, I don't.

The Court: That is what Mr. Stanbury's question was. The facts that you have recounted here would indicate that if there is such there might be some record in the office, but personally you know nothing about it?

The Witness: Personally I know nothing about it, and if anyone was to make a search of it it would be a very cumbersome job, because we don't have any ready record of it.

Q. (By Mr. Stanbury): The American Automobile Association is not licensed to sell insurance either as an insurer, [239] broker, or agent, in this state, is it?

(Testimony of Joseph D. Thomas.)

A. That is correct. Nor as a motor club.

Q. Nor in any capacity?

A. That is correct.

Q. In other words, it doesn't even operate in California as a motor club or auto club, does it?

A. Well, it doesn't operate as a licensed one. There are two or three organizations that claim affiliation with it. I don't know exactly their method of operation. But it itself is not licensed.

Q. It has affiliates under different names which deal with the public here? A. That is correct.

Q. One of which during the past year has been the Automobile Club of Southern California, has it not? A. That is correct.

Mr. Stanbury: No further questions, sir. Thank you.

Mr. Rowe: May it please the court, in view of the questions which were put to the witness by Mr. Stanbury, I would like to renew the offer to introduce in evidence the copy which a few moments ago was rejected. As I understood his questions, he went quite fully into how the Insurance Commissioner operated in passing upon a name.

Mr. Stanbury: I would like to be heard if your Honor has any doubt. [240]

The Court: Do you have any objection to it?

Mr. Stanbury: Yes, I do, your Honor, upon the grounds that it is hearsay and incompetent. It is a written opinion, just as oral testimony would be.

The Court: The objection is sustained.

(Testimony of Joseph D. Thomas.)

Redirect Examination

By Mr. Rowe:

Q. Is the American Auto Club licensed to sell insurance in the State of California?

A. No, it is not.

Mr. Rowe: That is all.

Recross-Examination

By Mr. Stanbury:

Q. Is it licensed as a broker or agent yet?

A. It has never filed any application as either an agent or a broker.

Q. As yet?

A. Well, I wouldn't know as yet.

Q. You have checked it up to now, have you, you know that up to now they have not applied for a license as a broker——

The Court: That is all he could say, Mr. Stanbury.

Mr. Stanbury: All right, your Honor. No further questions.

Mr. Rowe: That is all. May we take a few minutes, [241] recess, your Honor?

The Court: We will take a recess at this time.

(A recess was taken.)

Mr. Stanbury: Your Honor, I have the page from the current 1948 white directory with the entry of this company marked in red, "American Auto

Ins Co," and I ask that it be received as Plaintiffs' Exhibit next in order.

Mr. Rowe: I have no objection to it.

Mr. Stanbury: Now we finally rest.

The Court: Let it be received and marked as Plaintiffs' Exhibit No. 14.

The Clerk: So marked.

(The document referred to was marked Plaintiffs' Exhibit 14, and was received in evidence.)

Mr. Rowe: There are two other listings on the same exhibit that I want to call the court's attention to, your Honor, and offer. They are the listing of American Auto Association, abbreviated, "A-s-s-n," Agency abbreviated, "A-g-c-y"; and "American Auto Ins Co," the plaintiff company; "American Auto Wrecking Co."

The Court: Swear the witness.

SEWELL BROWN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please. [242]

The Witness: Sewell Brown.

Direct Examination

By Mr. Rowe:

Q. What is your residence?

A. 1304 East Mendocino Drive, Altadena, California.

(Testimony of Sewell Brown.)

Q. What is your business or occupation?

A. I am an insurance agent and broker.

Q. For how long have you been such?

A. Over 25 years.

Q. Approximately how many companies do you act as agent for? A. About four.

Q. Otherwise you as a broker place insurance in how many companies?

A. Innumerable. It is hard to say just how many. Maybe fifteen.

Q. Have you been in business in Los Angeles over this period of time that you have just indicated?

A. Most of the time. Part of the time in San Diego.

Q. But the most part in Los Angeles?

A. That's right.

Q. In Southern California the whole time?

A. That is right.

Q. Over these years will you state whether or not [243] you have developed a clientele?

A. Yes, sir.

Q. When someone who is a client of yours wishes to place insurance, will you state how that matter is handled as between you and your client?

Mr. Stanbury: That is objected to as immaterial, your Honor, and incompetent how this gentleman transacts his business.

The Court: The objection is overruled.

(Testimony of Sewell Brown.)

Mr. Rowe: You may answer the question, Mr. Brown.

The Court: That is, it is your purpose to show that that is the general practice in this vicinity?

Mr. Rowe: That is correct.

The Court: Do you know what the practice is generally in this vicinity, Mr. Brown, of placing the type of insurance—You have been sitting in the court room for some time?

The Witness: Yes.

The Court: That is, we are not considering life insurance. Are you familiar with the general practice in this community of placing that insurance?

The Witness: Yes, sir.

Q. (By Mr. Rowe): Will you state what it is?

A. The client informs me the type and kind of insurance he desires, and according to the line that he desires [244] I make my recommendations as to where I should place it for him.

The Court: Does he advise you in advance in what company he desires it placed, as a rule?

The Witness: Not as a rule, no, sir.

Q. (By Mr. Rowe): In what percentage of the cases that you handle or the placing that you make would you say you had a request from your client for any particular company?

A. We have occasional requests where a client will express and name a company. In most cases that is where they desire to have their policy renewed with the previous carrier. We have had that

(Testimony of Sewell Brown.)

type quite frequently, and those are the cases, generally where I have to exercise that business under my broker's license, if I am not appointed as an agent. It is infrequent. It is not too frequent.

Q. In what percentage of the policies that you place would you say you have a request from a client for any particular company?

A. About one-tenth of one per cent.

Q. About one-tenth of one per cent?

A. Something like that. It is hard to estimate it. It is impossible.

Q. Mr. Brown, among insurance people have you ever heard reference made to auto clubs?

A. Yes, quite a number of times. [245]

Q. Will you state how the people with whom you have talked in the insurance world with regard to auto clubs refer to such clubs? I mean by the full name of the club or by an abbreviation?

Mr. Stanbury: I am objecting to it, your Honor, on the ground that it is immaterial how people refer to clubs. It doesn't bear on any issue in this case that I know of.

Mr. Rowe: We are a club. We have heard a lot about how the plaintiff companies have been referred to. Since our club is in operation I think we are entitled to ask how clubs are generally referred to.

Mr. Stanbury: I have no question that if everyone knew they were dealing with a club the chance of confusion would be very much reduced.

(Testimony of Sewell Brown.)

The Court: The objection is overruled.

A. If a client comes in, if he is a member of a club, wanting to know their custom as to certain rates or discount by reason of being a club member, I ask them the name of the club, there are quite a few clubs around, in this area there is the Automobile Club of Southern California, the Randall Automobile Club, occasionally we will have the Orange County Automobile Club, I think is the name of it, and sometimes we have San Francisco people that are a member of the Northern Club up there, I forget the name of it at the moment. [246]

Q. (By Mr. Rowe): When reference is made to those types of organization by you or by such people, is the word "club" expressed or used?

A. Yes, they always say "club." National Automobile Club. It is not confusing at all to me, if that is what you mean.

Mr. Stanbury: I move that be stricken as a conclusion of the witness.

The Court: It may go out.

Q. (By Mr. Rowe): As an insurance man and one who has been in business in this area for some twenty-five years, I would like to ask whether there would be any confusion in your mind between American Automobile Insurance Company, or American Automobile Fire Insurance Company, or American Auto, and the word or title American Auto Club.

Mr. Stanbury: That is objected to as immaterial, incompetent and not the proper test.

(Testimony of Sewell Brown.)

The Court: Read the objection, please.

(The objection was read by the reporter.)

The Court: Isn't that substantially the same question that was asked by Mr. Stanbury that you objected to, Mr. Rowe?

Mr. Rowe: I don't recall having objected to such question. I may have. If I have, I have forgotten that I did. [247]

The Court: I think you objected to it, and the court made the remark—read that question.

(The question was read.)

The Court: Aren't you asking him a question that the court has to determine?

Mr. Rowe: I think in the final analysis that is correct.

The Court: You are asking him as an expert?

Mr. Rowe: Yes.

The Court: There are cases in California, Sim v. Weeks, 7 Cal. App. (2d), Pacheco v. Judson, in 113 Cal. a number of cases, which are directly in point that that is a matter which an expert shouldn't answer. It is the ultimate question to be determined by the court.

Mr. Rowe: If your Honor please, I think in the case of Jackman v. Mau——

The Court: That is one of the cases.

Mr. Rowe (Continuing): ——a similar question was asked and was answered without any disapproval of it by the upper court. I think they called

(Testimony of Sewell Brown.)

a man who was a manager of Hastings, or some other store, who had seen this sign and asked him if he was confused by it. I can't say that was the exact language, but that was the import of the question, and I think he answered that it was.

The Court: Was there an objection? [248]

Mr. Rowe: That I don't remember particularly. I won't press it, your Honor.

The Court: But it borders on that.

Mr. Rowe: You may cross-examine.

Cross-Examination

By Mr. Stanbury:

Q. Mr. Brown, there are people, no matter how rare they may seem in your experience, who ask for insurance in a particular company, are there not? A. That is right.

Q. Some of those people may have been insured in it somewhere else previously, of course?

A. That's right.

Q. They may know some one who is insured with them and have been satisfied with them?

A. Yes. sir.

Q. In other words, there are many, a variety of situations or inducements which may cause the rare person to seek insurance in a particular company?

A. That's right.

Q. I will put you a hypothetical case. If somebody wishing insurance in a certain company were to telephone what they believe to be that company through, let us say, an error in name in their mind,

(Testimony of Sewell Brown.)

or an error in their looking in the telephone directory, and spoke to the wrong party [249] unawares, there is nothing in the insurance set-up, for example, say that you were the person called, which would prevent your writing insurance for them, would there be?

Mr. Rowe: May I hear the question, your Honor?

The Court: Read the question.

(The question was read by the reporter.)

Mr. Rowe: I object to the question on the ground it is compound and complex, and as far as I am concerned it is unintelligible.

Mr. Stanbury: It may be unintelligible, and I think it is unintelligible when I hear it read back.

Q. (By Mr. Stanbury): Mr. Brown, you refer to the way people talk about clubs, people often say, "I am insured with the Auto Club," for example, do they not? A. That's right.

Q. As a matter of fact, they don't actually have insurance with the Auto Club, do they?

A. In some cases.

Q. Well, the Auto Club, for example, writes no liability insurance at all?

A. That's right, but they write the material damage.

Q. But they write collision?

A. Yes, comprehensive fire and theft.

Q. But as far as their liability insurance is concerned, it is written, I believe, with the Standard

(Testimony of Sewell Brown.)

Accident [250] Company? A. That's right.

Q. But people have that habit of saying "I am insured with the Auto Club," do they not?

A. That's right.

Q. Do you know—and please give me yes or no—do you have positive information of your own knowledge, positive information, whether the National Automobile Club even takes applications for insurance or has anything whatever to do with the brokering or acting as agent for any company?

A. To my knowledge they do not.

Q. That's right. That is, you know that to be a fact, that unlike the Automobile Club of Southern California, the National Automobile Club has hands-off insurance altogether, do they not?

A. That's right.

The Court: This is beside the point, but what is the function of the National Automobile Club?

Mr. Stanbury: It is purely and simply a club with nothing whatever to do with insurance. This gentleman has testified accurately on that.

Mr. Rowe: Just let me check.

The Court: Does it render any service to its members?

Mr. Stanbury: Yes. I am a member and can speak for [251] what service they do render.

The Court: But it has nothing to do with insurance?

Mr. Stanbury: Nothing whatsoever.

Mr. Rowe: Are you saying now as a member of

(Testimony of Sewell Brown.)

the National Automobile Club if you came to the Club after an accident, for example, that you would get no assistance whatsoever from the Club regarding any insurance?

Mr. Stanbury: None whatsoever. They would tell you to go elsewhere. They will tow you—they will pay your towage fees, they will give you maps, they will do other things that clubs do——

The Court: That is just in line with what Mr. Brown has said, that they don't handle any insurance.

Is that correct?

The Witness: They are not writers.

Mr. Stanbury: Thank you, Mr. Brown. No further questions.

* * *

Mr. Rowe: May I, in view of the testimony, your Honor, [252] just read this into the record?

The Court: Do you want to show that your own witness' testmiony is incorrect?

Mr. Rowe: I don't know. I want to show as far as the National Automobile Club is concerned in its folder it says: Insurance Claims—The Legal Department assists the member in collection for damages to his car caused by automobiles.

That would be in reply to Mr. Stanbury.

The Court: That isn't material.

Mr. Stanbury: That is another matter, if your Honor please. That is helping an insured subrogate.

Mr. Rowe: Then it says: substantial reduction on members' collision premiums is granted by the strongest and most reliable companies in the business.

Mr. Stanbury: I would like to call back Mr. Brown and have him explain that.

The Court: I don't think that is material. I just asked for a matter of information, in view of what Mr. Brown said. Some reference was made to the National Automobile Club. I think we would go far afield if we would attempt to go into these matters now.

Mr. Stanbury: All right, your Honor. [253]

GILBERT R. SCHWARZ

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rowe:

Q. What is your residence?

A. 7512 Flight Avenue, Los Angeles 45.

Q. What is your business or occupation, Mr. Schwarz?

A. I am manager of the local office of Western States Insurance Brokers.

Q. Does that organization have any agency contracts, or is it entirely a brokerage business?

A. Strictly brokerage business.

Q. Are you yourself a licensed agent or broker?

(Testimony of Gilbert R. Schwarz.)

A. I am a licensed solicitor.

Q. Do you have requests from persons from time to time who are clients of that company for placing insurance, do you have customers or clients who call you to have insurance placed?

A. Very frequently, yes.

Q. Do those calls come to you?

A. They come to me personally.

Q. In what percentage of cases, if any, would you say [254] the customer or your clients indicate the company in which the insurance is to be placed?

A. I can definitely say that it has happened to me once since August 1st, the date that I took over the management of the office.

Q. Once since August 1st. Can you give us any idea how many policies of insurance you have placed since that time?

A. Strictly automobile, I presume?

Q. Yes, that is all we are concerned with.

A. I would say probably 75 to 100.

Q. Have you ever heard of American Associated Insurance Companies? A. I have.

Q. You have been in business how long? About four years?

A. A little less than four years.

Q. Have you heard of American Automobile Insurance Company? A. I have heard of it.

Q. Have you heard it referred to as American Auto? A. I have.

Q. Have you also heard of it referred to as American Associated Insurance Companies?

(Testimony of Gilbert R. Schwarz.)

A. I have heard it referred to as American Associated [255] Group.

Q. That is, within the period of time that you have been in the business, about four years?

A. That's right.

Mr. Rowe: You may cross-examine.

Cross-Examination

By Mr. Stanbury:

Q. Mr. Schwarz, you have heard of the American Automobile Insurance Company referred to as American Auto, have you not, sir?

A. I have.

Q. Is there any other organization that you know of in this state that you have ever heard referred to as American Auto besides these plaintiff companies? A. No.

Q. You have also heard of the American Associated, have you not? A. I have.

Q. You have heard of them referred to, as you say, as American Associated Group?

A. That's right.

Q. As an insurance man you understand, I take it, that the American Automobile Insurance Company is an entity belonging to a group of affiliated companies, do you not? [256] A. I do.

Q. You as an insurance man have heard of the Commercial Indemnity Company, have you not?

A. I have.

Q. But you also know of it as a member of the Loyalty Group? A. That is right.

(Testimony of Gilbert R. Schwarz.)

Q. You have heard of the London-Liverpool Group, have you not?

A. London-Liverpool and Globe.

Q. But you also know of the Globe Indemnity Company as a separate entity? A. Yes, I do.

Q. Whenever anyone says "Globe" to you you think of Globe Indemnity? A. Yes.

Q. When anyone says "Royal" to you you think of Royal Indemnity?

A. Royal Indemnity, Royal Insurance.

Q. When they say "American Auto" you think of "American Automobile Insurance Company," that is right, isn't it? A. I would say yes.

Q. And when you hear "American Associated," you think of the Group? A. That's right.

Q. And you have been manager of your present company [257] since last August 1st?

A. August 1st.

Q. You have been in Los Angeles how long?

A. Since that date.

Q. And the contact you have had with this phase American Auto, and others, has all been, then, in the last five or six months? A. No.

Q. Have you heard about it before you came here?

A. I heard of it in San Francisco.

Q. You heard of them both before and after coming to Los Angeles? A. That's right.

Q. With reference to your particular telephone calls, what percentage of the calls you get from

(Testimony of Gilbert R. Schwarz.)

assureds or prospective assureds is in connection with the acquisition of insurance? All of it in your department, or what?

A. Any telephone call I get is regarding insurance matters.

Q. Might it be in regard to claims?

A. It definitely may be.

Q. So this group of people of whom you say—I believe you said only one has asked for a particular company—you are including everyone who has called up about a claim, is that right? [258]

A. When I answered that question we were referring to placing business.

Q. All right. You have had calls from people who wanted insurance? A. That's right.

Q. But a great majority of those are people that want renewals, are they not?

A. Not necessarily.

Q. Don't you get calls from most of the people who do want renewals?

A. I generally write a renewal solicitation letter to people regarding renewals.

Q. Then you usually get a phone call or letter in reply? A. Postcard, self-addressed.

Q. Then the people you talk to aren't all new applicants looking for insurance to start out with?

A. Not all of them.

Q. Not a very big percentage, would you say, are?

A. I answered the question that about 75 to 100

(Testimony of Gilbert R. Schwarz.)

new policies were written since August 1st in my office.

Q. I didn't understand that. That is the total of new policies?

A. Since about October—since August 1st, since I have been in the office. [259]

Q. Of those there is only one that you recall who did ask for a particular company?

A. That's right.

Q. You know from your experience in insurance business elsewhere that there are people, however, few they may be, who have for some reason peculiar to themselves a preference for a certain company?

A. That's right.

Mr. Stanbury: That is all. I have no further questions.

The Court: That is all.

WALTER MULLER

called as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Rowe:

Q. Mr. Muller, will you state your occupation? You may have stated it.

A. I am a service station operator.

Q. And you operate in Hollywood?

A. In Hollywood under the concern name of Muller Brothers.

(Testimony of Walter Muller.)

Q. And that is a partnership between you and your brother? A. Yes. [260]

Q. You also have an automobile agency at that place? A. Yes.

Q. Oldsmobile agency? A. Yes.

The Court: And he is an insurance agent, that is, his company.

Q. (By Mr. Rowe): You have been in the service end of the business for a great number of years, have you not? A. Yes, sir.

Q. In any period of that time have you been connected with any automobile club insofar as servicing cars of its members is concerned?

A. Yes, sir.

Q. With what club?

A. The Automobile Club of Southern California.

Q. And how long were you connected with that organization? A. About 15 years.

Q. And what was your service?

A. Our service was—we were an official garage for the Automobile Club of Southern California, took care of any emergency calls, rendered 24-hour service, tire service, battery service, wreck service, tow service, any emergency calls where a motorist was out on the road in trouble.

Q. In connection with that service did you have any [261] equipment which was particularly adapted for that purpose? A. Yes, sir.

Q. What would that be?

A. We were connected with the Auto Club for a

(Testimony of Walter Muller.)

period of about 15 years, and during that period we built up several hundred thousand dollars worth of equipment in the matter of tow trucks, pick-ups, battery service trucks, tire service trucks, tow trucks, and so forth. In fact, we had six pieces of equipment.

Q. Do you still have that connection with the Automobile Club of Southern California?

A. No, sir.

Q. When was it terminated?

A. It was terminated in 1947.

Q. Was that about the time you gave consideration to the formation of an auto club on your own initiative? A. Yes, sir.

Q. And thereafter did you cause the Auto Club of Hollywood to be incorporated.

A. Yes, sir.

Mr. Rowe: I would like at this time, your Honor, to introduce in evidence a copy of the Articles of Incorporation of the Auto Club of Hollywood. Mr. Stanbury has seen it and he is satisfied with the plain copy and lack of [262] certification.

The Court: Let it be received in evidence and marked as Defendant's Exhibit M.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit M, and was received in evidence.)

Q. (By Mr. Rowe): After the Auto Club of Hollywood was incorporated the proceedings took

(Testimony of Walter Muller.)

place to which Mr. Thomas testified here earlier with regard to the name? A. Yes, sir.

Q. And as a result of those proceedings the name was changed to American Auto Club, is that correct? A. Yes, sir.

Mr. Rowe: I would like to introduce as part of the same exhibit the certificate of amendment of American Auto Club.

The Court: It may be attached to the same exhibit.

Q. (By Mr. Rowe): How did you happen to choose the name American Auto Club, Mr. Muller, will you state to the court?

Mr. Stanbury: It is objected to as immaterial, your Honor.

The Court: It is overruled.

A. Well, as I stated before, after the World War I we established this service station business in Hollywood, my brother and I, and have been operating over a period of [263] about twenty-eight years now. During that time we established this business, built it up into quite a large institution, in fact, up to now we have 175 employees, and we have an investment of over a million dollars in our establishment. Some 15 years ago we made the connection with the Automobile Club——

Mr. Stanbury: Pardon the interruption, sir. I move to strike the whole answer, your Honor. The question was how did you happen to choose the name "American Auto Club."

(Testimony of Walter Muller.)

The Court: Yes. Did you have in mind that was the question?

The Witness: Yes.

The Court: Go ahead with your answer. Wait until the answer is finished.

A. (Continuing): We built up a large business. About 15 years ago we made the connection with the Automobile Club of Southern California to be their official garage in the Hollywood district, which was a small territory at first, and then it was enlarged during the war, and we maintained 24-hour service and built up our service equipment to the extent that it was quite an asset to our business in the matter of making contacts with customers and getting repair jobs and so forth. Through a political maneuver, over which we had no control, we lost this connection. We had several thousand dollars' worth of equipment on hand, [264] and it gave us the thought of establishing an auto club of our own to maintain this contact with customers. At that time we proposed to call it the Auto Club of Hollywood. After that was objected to by the Automobile Club of Southern California, we asked for some other names to be submitted. For quite some time we gave it quite a consideration, as to the name. Among the names submitted was the name American Auto Club.

The Court: Who submitted the name.

The Witness: I think it was our attorneys. They submitted a group of names——

(Testimony of Walter Muller.)

The Court: You should know who submitted it. You and your brother are in charge of this business?

The Witness: Yes, sir.

The Court: You say names were submitted.

Mr. Rowe: He means to the Insurance Commissioner, your Honor.

Mr. Stanbury: Does he?

The Court: I got the impression that the names were submitted to you, and you gave them consideration.

The Witness: Yes. I think it was submitted by Mr. Potruch, our lawyer.

The Court: He suggested certain names?

The Witness: Certain names, yes.

The Court: And you selected one of [265] them?

The Witness: Yes.

Mr. Stanbury: Before we continue, the lengthy answer of the witness, which contained the history of Muller Brothers in concise form, I move to strike the whole of said answer down to the place where he said, "We selected the Auto Club of Hollywood," on the ground it is not responsive to the question.

The Court: Yes, I think it is not responsive.

Mr. Rowe asked you after you determined it was necessary to amend your articles and change the name, why did you select the name which you now have?

The Witness: Because we felt that it would ap-

(Testimony of Walter Muller.)

peal to a larger group of a clientele than the original name, Auto Club of Hollywood. We were told that we had quite an idea and it was a good idea to establish an auto club.

The Court: Who told you that?

The Witness: Our friends, friends we talked with, and our business associates.

The Court: In any event, then you decided on the name——

The Witness: American Auto Club. It appealed to us, the name appealed to us as being very popular, and our advertising man——

The Court: But Mr. Potruch submitted to you certain names, among these names he submitted for your consideration was the American Auto Club? [266]

The Witness: Yes, sir.

The Court: You decided that would best serve your interests, is that correct?

The Witness: We consulted, also, our advertising agency, and——

The Court: That is employed by you, isn't it?

The Witness: That's right.

The Court: Whatever it was, you decided it was for your best interest, whether for advertising or what?

The Witness: Yes.

The Court: Go ahead.

Q. (By Mr. Rowe): Did that name "American" have any particular appeal to your fancy in any particular way? A. Yes, it did.

(Testimony of Walter Muller.)

Q. In what way?

A. It just seemed that it had a universal appeal. In fact, the definite deciding thing—I was driving down the street and I saw a big van, American Van & Storage, and it looked nice. And also when I was in Europe in 1927 the American Express was the center of gravity for all Americans. The word "American" appealed to me. It just stood out as being a name that would have universal appeal for an auto club, and it didn't conflict with any of the other auto clubs, and for that reason I submitted it to my advertising agency, and he said, "That is the name that rings the bell."

Q. Since this club has been organized, Mr. Muller, approximately how much would you say you have expended in its development?

Mr. Stanbury: That is objected to——

Q. (By Mr. Rowe): That is, the club has spent.

Mr. Stanbury: Objected to as immaterial, unless it is limited to what he spent on this name, your Honor.

The Court: Read Mr. Stanbury's statement.

Mr. Stanbury: Then, I object to it unqualifiedly.

(The record was read by the reporter.)

The Court: In other words, you are making a general objection to it, also?

Mr. Stanbury: Yes, that it is immaterial.

The Court: What is the purpose of it?

Mr. Rowe: The purpose is to show the status

(Testimony of Walter Muller.)

of the organization. If we were in business and had been in business for a time, and we were trying the same issue, we certainly, I think, would be entitled to show the status of our business and how it was being operated. Since we are not actually in business, I think we are entitled to show the amounts that have been expended towards the development of the club up to this point, and, likewise, to show how the people who are going to run this club intend to operate.

The Court: What is this last part—how you intend to [268] operate?

Mr. Rowe: I haven't gotten to that yet.

Mr. Stanbury: Your Honor, I concede if the defendant were in business under this name, that he certainly could show that, he could show that he had been in business for six months or nine years, as in the Standard case, for example. But he hasn't gone into business. The most that I see that could be material is what has he put into this name; not into a club that first he had under a different name. I submit that is immaterial, because he is not in business. And if before he emerges from a chrysalis state he spends a lot of money that couldn't be chargeable to any laches on the part of the plaintiffs, I submit that is immaterial. But I respectfully submit if any part of it is material, it is only that that is tied up with this name and not with the whole idea of a club.

(Testimony of Walter Muller.)

The Court: That may be. I think that should be the limitation.

Q. (By Mr. Rowe): Subject to that limitation, how much, Mr. Muller, expense have you incurred in connection with the acquiring of the name "American Auto Club"? A. About $7,000.

Q. Who are the stockholders of the American Auto Club? A. My brother and [269] myself.

Q. How much stock has been purchased by both of you? A. $10,000 worth.

Q. That is the investment of the club?

A. Yes, sir.

The Court: This expense goes just to the use of the name American Auto Club, not to the expense of organization?

Mr. Rowe: That is correct.

The Court: You didn't include that, did you? Did you include all expenses?

The Witness: I included all the expenses.

The Court: He didn't understand.

Q. (By Mr. Rowe): Can you limit that to the expense of the name, Mr. Muller?

A. No, sir.

Q. You have had printed a form of application for membership and service contract in the American Auto Club, and it is marked here Plaintiffs' Exhibit 2, and on the reverse side of this are certain statements with regard to towing service, emergency road service, bail bond service, discount service, financial service, buying and selling service

(Testimony of Walter Muller.)

theft service, map service, touring service, license service, insurance service, hunting, fishing and camping service, protective emblems; does that page contain an accurate statement of the various services which American Auto Club proposes to render to those who may become its [270] members?

A. Yes, sir.

Q. Does that page contain a complete statement of the services which the American Auto Club proposes to render to its members? A. Yes, sir.

Q. Does the American Auto Club expect to act either as an insurance agent or broker for any type of insurance? A. No, sir.

Q. Does the American Auto Club expect at any time to act as a writer of insurance, that is, as the plaintiff companies do? A. No.

Q. The emblem which has already been introduced in evidence, I believe you testified to previously, is the one that has been selected by those who are in charge of the club? A. Yes, sir.

Q. The reason the club has not gone forward to commence its activities beyond what has actually happened is due to the fact that with the filing of this suit the club suspended its operations until the suit was determined, is that correct?

A. Yes, sir.

Mr. Rowe: You may cross-examine. [271]

(Testimony of Walter Muller.)

Cross-Examination

By Mr. Stanbury:

Q. Mr. Muller, yesterday I read to you that passage of your deposition in which you stated:

"We had in mind approaching Mr. Sessions if he had a good enough discount for us to operate"; and the question:

"When I say 'you' I mean the American Auto Club also";

"A. That is me, the same thing."

You recall that?

A. Yes, sir.

Q. You already as Muller Brothers had arrangements with companies, did you not?

A. Yes, sir.

Q. You were agent for what company?

A. GMIC and the Harbor and Republic.

Q. They write a general line of automobile insurance, do they not? A. Yes, sir.

Q. Liability and material damage?

A. Yes, sir.

Q. And when you said that you meant to approach Mr. Sessions if he had a good enough discount for us to operate, [272] you meant something in addition for the American Auto Club?

A. In addition for Muller Brothers.

Mr. Stanbury: May I, if the court please, see the original file?

(File handed to counsel.)

(Testimony of Walter Muller.)

Q. (By Mr. Stanbury): I call your attention to the answer that you filed to the original complaint in this case, dated or filed on April 20th of last year, '48; do you recognize that answer?

A. Yes, sir.

Q. On page 3, paragraph X, is the following:

"Answering paragraph IX, this defendant admits that it proposes to enter the automobile insurance business and to sell, under the name of American Auto Club, various types of automobile insurance policies";

I correctly read from it, did I not?

A. Yes, sir.

Q. And you swore to that, did you not, on April 19, 1948? A. Yes, sir.

Q. You read it before you swore to it, did you not?

A. I don't remember whether I read it or not. I have a lot of those to sign, and I very seldom read those answers. They are prepared by the attorneys, and I am told to sign [273] them, and I very seldom read them.

Q. You don't mean that you are sued so many times that you sign so many answers you are too busy to read them?

A. No; but we sue a lot of other people.

Q. Do you know whether you read that answer before you swore to it, or not?

A. I don't recollect. I imagine I did, but I never gave it a lot of thought as to the wording of it.

(Testimony of Walter Muller.)

Q. That is your signature, isn't it?

A. Yes, sir.

Q. You did swear to it before a notary public, did you not, sir? A. Yes, sir.

Q. And I assume that before the answer was filed you conferred with your attorneys about this law suit, did you not? A. Yes, sir.

Q. And when you gave your testimony on October 8th of last year that I just read, in part, and in whole yesterday on this subject, page 8, were you at that time trying to tell the truth about your intentions with regard to insurance? [274]

A. Yes, sir.

Q. And now your testimony is that what you intend to do regarding insurance is what is shown under Insurance Service on the back of this Exhibit No. 2, is it not? A. Yes, sir.

Q. You don't wish to modify that any further, do you, Mr. Muller? A. No, sir.

Q. All right. Now, the $7,000 you paid, that includes, I assume, money spent for attorneys' fees, and so on, protecting the name Auto Club of Hollywood, or attempting to protect it, does it not?

A. Not necessarily.

Q. At least you don't contend that the $7,000 was spent in amending——

The Court: He stated no, that it was all the expenses.

Q. (By Mr. Stanbury): With reference to your reason for wanting the name American, you and I

(Testimony of Walter Muller.)

left the office of your attorney after your deposition in the same elevator, did we not, with the court reporter? A. Yes, sir.

Q. And there was just some casual talk back and forth between us, was there not?

A. I don't remember at the time.

Q. Do you remember telling me at that time that you [275] wanted the word "American," wanted the name "American" so you would be listed first in the telephone directory under clubs?

A. That's right, sir.

Q. That was your reason then?

A. That was one of the reasons.

Q. The equipment you have for operating this club, you can use that under any other name that you wanted to do business under, could you not, your equipment? A. Yes, sir.

Q. Would your desire for the word "American" be satisfied with the name "American Motor Club"?

A. No, sir.

Q. That is to say, the word "Motor" would kill your fondness for the word "American," is that what you mean? A. Yes, sir.

Mr. Stanbury: I have no further questions.

Mr. Rowe: If it please the court, I find myself in this position: I thought I had satisfactorily explained the allegations of the original answer to Mr. Stanbury at the time we took Mr. Muller's deposition. Apparently he is not completely satisfied with the explanation which I have given. In

(Testimony of Walter Muller.)

view of that fact, although I know it is not ordinary procedure, I would like to be permitted to testify, but I don't want to be disqualified from further participating [276] in the case.

Mr. Stanbury: I will waive that.

Mr. Rowe: You will waive the disqualification?

Mr. Stanbury: Yes.

Mr. Rowe: Step down, Mr. Muller.

EDGAR H. ROWE

called as a witness by and on behalf of the defendant, having been first duly sworn, testified as follows:

The witness: My name is Edgar H. Rowe. I am an attorney at law duly licensed and qualified to practice in all the courts of the State of California. Shortly after——

Mr. Stanbury: Pardon me. Would you mind, Mr. Rowe, proceeding by question and answer of yourself?

The Witness: That would be fun.

Mr. Potruch: Do you want me to ask the questions?

The Witness: I think I can ask myself the questions.

The Court: You do not need to ask yourself questions. You make a statement, and if there is any part you desire to strike out, Mr. Stanbury, then you may move to strike it out, unless you want Mr. Potruch to examine you.

(Testimony of Edgar H. Rowe.)

The Witness: I would prefer to make the statement.

The Court: Make a concise statement in explanation of what you have.

The Witness: Shortly after the complaint was filed in this action it was mailed to our San Francisco office where [277] I am located.

The Court: What is your office?

The Witness: Bronson, Bronson & McKinnon, 1500 Mills Tower, San Francisco, California. When the complaint came in to our office it was assigned to me for attention. I prepared the answer without ever having consulted with Mr. Muller prior to its preparation. I prepared the answer in extreme haste by reason of the fact that I had made an application for an extension, and I had been allowed an extension of time conditioned only on an answer. Being pressed by other matters, the answer went until quite late; it was done hastily. I prepared the allegation. It is my sole responsibility that that particular allegation appears in the answer, and I repeat it was done without prior conference with Mr. Muller as to the allegations of the complaint, by reason of the fact that I was in San Francisco and he was here. What conferences he may have had with Mr. Potruch, I don't know.

I might add to the statement that when we took depositions by stipulation in this matter, at the deposition I called Mr. Stanbury's attention to the fact that the allegation in the answer was erroneous and that I was going to amend it.

(Testimony of Edgar H. Rowe.)

The Court: Did you ask to have it amended?

Mr. Rowe: It has been amended. [28]

Mr. Stanbury: That's right.

Mr. Rowe: At that time Mr. Stanbury said he will waive an amended complaint, and we agreed, as lawyers do, to waive the formalities, and I prepared an amended answer, and the case is going to trial on the amended answer, and I assumed at that time the explanation I made to Mr. Stanbury was satisfactory to him.

Mr. Stanbury: I can state to the court it is perfectly satisfactory, as far as counsel was concerned, but I did not intend to overlook it as an admission by the client, of course.

The Court: We have all the matters now before the court. Are there any further questions?

Mr. Stanbury: Yes. If I may look at my file for just a moment, if your Honor please.

Cross-Examination

By Mr. Stanbury:

Q. Did you prepare the Articles of Incorporation? A. I did not.

Q. Your office did, did it not?

A. This office here. I can shorten your examination, I think, by saying this: My only acquaintance with this case is that I came down and attended and took charge of the hearing before the Insurance Commissioner with regard to the other name, did some briefing on that, and with this case [279] here.

Q. In your answer—I am attempting to find my

(Testimony of Edgar H. Rowe.)

copy. Do you want to see your answer, Mr. Rowe, as I call your attention to it?

The Court: That is the amended answer?

Mr. Stanbury: No. The original answer with this admission in it.

A. I think I am familiar with it.

Q. All right. In the answer, and outside of your special affirmative defense, the only affirmative admission which you made was that which was read to Mr. Muller a moment ago about the intention to sell insurance?

A. I haven't checked it, but I think that is correct.

Q. When you made that express admission——

A. I admitted that you sent us a letter.

The Court: He hasn't finished the question.

Q. (By Mr. Stanbury): When you made that express admission which I read to Mr. Muller, did you have any information at all to go by?

A. None except that I was a little puzzled by the allegations of your complaint, and I think if you will look at it it is not clear from the allegations of your complaint whether you allege that we will sell and issue as an insurer, or whether we will perhaps sell as a broker or agent That is as I recall it. [280]

Q. When you gave this answer: "This defendant admits that it proposes to enter the automobile insurance business and to sell, under the name of American Auto Club, various types of automobile

(Testimony of Edgar H. Rowe.)

insurance policies''—that was not dictated by any confusion arising from the complaint, was it?

A. I thought it was correct.

Q. That is the reason that you dictated it that way was because you found the allegation confusing for any other kind of denial, is that right?

A. I don't know. I wasn't clear in my own mind. I have that faint recollection of not being clear in my own mind as to whether you were charging us with selling and issuing as brokers, or selling and issuing as insurers.

Q. So, therefore, you made an express allegation as I just read? A. That is correct.

Q. Did you have any information to go by when you made that allegation, that admission?

A. I would say that I had no positive information; that I thought I was answering the complaint properly.

Q. This complaint, how long did you have to answer it? A month, or what was it?

A. We had one extension of time. I can't remember how long it was?

Q. About a month, was it not?

A. I am not quite sure.

Q. Did you during the period of time that you had attempt to ascertain in the facts. You did, did you not?

The Court: Mr. Stanbury, I think you are really extending the cross-examination upon this particular point.

(Testimony of Edgar H. Rowe.)

Mr. Stanbury: Belabornig the point?

The Court: Yes. We know that unfortunately sometimes attorneys take the matter in their own hands when they feel that they are rushed. There is no use of any dissertation on the part of the court. Attorneys are constantly getting extensions of time, as much as they can, from each other. They are courteous. But in this case it was a desire on the part of everybody to bring it on, and sometimes they overreach themselves and put in more there than they are justified in doing by reason of any statment of their clients. It is unfortunate, but it happens occasionally.

Mr. Stanbury: I don't question the bona fides of counsel at all, your Honor, but I make the point that the defendant read it, and the defendant's testimony in his deposition is what it was. That is why I am unwilling to let it pass merely as a lawyer's error.

The Court: The court isn't going to make any remark about it now. It may at a later time when it comes to a decision in the case, if it deems it necessary. [282]

Mr. Stanbury: All right.

The Court: If you have any further cross-examination, you may proceed with it.

Mr. Stanbury: I have no further questions, your Honor.

Mr. Rowe: May it please the court, I think we are prepared to close our case with the introduc-

(Testimony of Edgar H. Rowe.)

tion of a fairly large number of copies of the Insurance Journal, which I intend to identify by date and page as the plaintiff did.

Mr. Stanbury: I will stipulate to them. Just read them off as fast as you want to and tear them out, or whatever you want to do.

Mr. Potruch: We just got some of them in, your Honor.

The Court: Wouldn't a few of them be representative, Mr. Rowe?

Mr. Rowe: I have eliminated some that seem to be repetitious. What I am trying to do is pick up the time from 1944 forward, that is what I am trying to do.

The Court: You may proceed.

Mr. Rowe: I have here copies of the Insurance Journal—I will have to take these in any order. I have here a copy of the Insurance Journal of November, 1945, and I am offering in evidence page 9, which contains an advertisement by American Associated Insurance Companies.

Mr. Stanbury: Do you want to tear them out, Mr. Rowe?

Mr. Rowe: They don't belong to me. I don't think we [283] can.

I would like to introduce page No. 11 from the Insurance Journal under date of October, 1947.

The Court: You would like to do what?

Mr. Rowe: Introduce page 11 from the Insurance Journal of October, 1947. These, I presume, may be the same exhibit.

(Testimony of Edgar H. Rowe.)

The Court: Very well. Proceed with your offer.

Mr. Rowe: Page No. 7 from the Insurance Journal of July, 1947; page No. 9 from the Insurance Journal of October, 1946; page No. 7 from the Insurance Journal of June, 1948; the front cover of the Insurance Journal of September, 1944.

The Court: They may be received as Defendant's Exhibit——

Mr. Rowe: I have two or three more, your Honor, and I will be finished with them. Page 7 of the Insurance Journal of April, '47; and page 5 of the Insurance Journal of August, '47; an article appearing on page 3 of the Insurance Journal of July, 1944, headed "American Associated Group Coordinates," and this article refers to the coordination of these particular companies. I have penciled the article. An article on page 10 of the Journal of October, 1944, headed "American Automobile adds to Directory," an article appearing on page 6 of the Insurance Journal of March, 1945, headed "American Associated Gp."—"group" I suppose that is—"Combines San Francisco Offices." Then I offer the inside of the [284] last part of the cover sheet on the October 25, 1948, issue of Underwriters' Report.

The Court: These may be received and marked as Defendant's Exhibit N.

The Clerk: So marked.

(Testimony of Edgar H. Rowe.)

(The documents referred to were marked Defendant's Exhibit N, and were received in evidence.)

The Court: Anything further, Mr. Rowe?

Mr. Rowe: Just one thing and I am through with that. I would like this to go into the exhibit. The December 23, 1948, issue of the National Underwriter, and I am referring to the inside of the front cover.

Mr. Stanbury: What is the date, please?

(The record was read.)

Mr. Rowe: Defendant rests. [285]

* * *

Mr. Rowe: May it please the court, when we concluded yesterday I neglected to introduce one exhibit. Mr. Stanbury and I stipulated, subject to your Honor's approval that Best's Insurance Guide With Key Ratings for 1948 may be introduced in evidence, and the exhibit is offered only for the names of the insurance companies which are listed on the left-hand side of each page as one holds the book in front of him.

Mr. Stanbury: No objection.

The Court: It may be received as part of Exhibit N?

Mr. Rowe: N, I think, deals with another subject, your Honor.

The Court: Defendant's Exhibit O in evidence.

(The document referred to was marked Defendant's Exhibit O, and was received in evidence.)

Mr. Stanbury: There is one other matter, also, your Honor.

The Court: Wait just a minute, please.

What page is this on? [290]

Mr. Rowe: On all pages. The companies here involved, I am not sure of the number of the page, but if you let me have the book I can point them out to you.

(The book was handed to counsel.)

Mr. Rowe: The companies here involved are listed at the bottom of page 35 and the top of page 36.

The Court: Are you just asking to introduce the part at the bottom of page 35 and the top of page 36?

Mr. Rowe: No, your Honor. I was asking to introduce the many names that are listed in the columns on the left-hand side of the pages to illustrate the number of insurance companies which have similar names.

The Court: You don't want any below "American," but just including the word "American"?

Mr. Rowe: I had thought to go further than that, but if your Honor feels it should be limited to that, I won't press it.

The Court: There seems to be no objection to it. It appears, just looking at it, that there are not

many more there than there were shown in the list of California insurance companies. There may be some more.

Mr. Rowe: I think there are quite a few more.

The Court: Now, Mr. Stanbury.

Mr. Stanbury: Yesterday we stipulated to the corporate identity of the plaintiffs, and that stipulation is to be [291] further clarified.

It is stipulated that each of the plaintiff companies is and at all material times was a corporation organized under the laws of the State of Missouri.

Mr. Rowe: So stipulated.

Mr. Stanbury: And the Answer admits that the defendant is a California corporation.

* * *

The Clerk: Exhibit 2 seems to be missing, your Honor.

Mr. Stanbury: We agreed to substitute a copy of it. No one knows what became of the original.

* * *

(Whereupon Mr. Stanbury presented the opening argument on behalf of the plaintiffs and Mr. Rowe presented the [292] argument on behalf of the defendant, which arguments were reported by the court reporter but not transcribed.) [293]

* * *

The Court: The court does not have time, nor the inclination under the circumstances, in view of

the fact that there has been such a comprehensive argument presented by the attorneys, to take any extended time in ruling upon this matter .

There has been a great deal of testimony here, and I believe it is all, or substantially all, fresh in the minds of those present. Of course, it is impossible to recall all of the testimony in a case which has taken several days for trial, and in which there has been a great deal of printed evidence received and considerable testimony relating to such evidence.

I think that the plaintiffs must fail for two reasons. The first is that there is no secondary meaning as claimed by the plaintiffs. If the plaintiffs' names had ever acquired any secondary meaning, even in remote degree, it has been largely dissipated by the conduct of the plaintiffs in [296] the last several years, say, the last four years or so since they have changed their type of advertising and have used the advertising which they now employ. There has been no newspaper advertising that the court can recall, or any advertising (except in a very slight sense) to what might be even a part of the public in the last four years.

That is my recollection of it. I may have overlooked something, but this is my recollection that there has been nothing substantial done along that line within approximately the last four years, and probably more. It may be a few months more than four years. Since that time apparently there has been an effort on the part of the plaintiffs to have their companies known as the Associated Group.

That has been the tenor of their advertising, instead of the other.

Their emblem has been changed, and the general type of advertising has been along that line. There has been a change in the type of contact through the telephone calls. That has been changed some four years or so; three years at least.

There still remains in the minds of some of the insurance agents, no doubt, the use of the words "American Auto," which were originally employed, and when it is referred to in the old way by some of the people who are in the business they still think of the plaintiff companies. [297] But I do not think that attaches to the public, or to any considerable portion of it. I think it is negligible, in fact.

Along the line that the court has just spoken of, I do not know whether you gentlemen are familiar with the case of Selchow & Righter v. Western Printing & Lithographing Company, 47 Fed. Suppl. 322. There the court stated:

"That buyers for retailers had for years associated the trade-mark 'Parcheesi' * * * with plaintiff did not establish that name had acquired such a 'secondary meaning' for the public generally or any considerable portion thereof as to entitle plaintiff to exclusive right to use of the name."

In that case reference is made to the case of Steem-Electric Corp. v. Herzfeld, 118 Fed. (2d) 122. The court in the Steem-Electric Corporation case on page 125 said:

"Assuming that plaintiff's testimony in this re-

spect furnishes some support for its contention that the trade-mark 'Steem-Electric' carried a secondary meaning, it must be remembered that its dealers and agents, exclusively engaged in purchasing and selling its product, would naturally associate with plaintiff the product sold under its trade-name. It does not follow that the public or any considerable [298] portion thereof would be thus impressed. * * *"

I did not have time to Shepardize all of the cases cited. They are great in number, and, as Mr. Rowe said, I think that the court can only be enlightened by reading the cases and finding out what other courts have decided, and then apply the law to our own particular facts. After such application my conclusion is that there has been no establishment of a secondary meaning as contemplated by the decisions.

I think that the plaintiffs' case also will have to fall because there will be no confusion as claimed by the plaintiffs. There certainly will be no confusion on the part of the persons who are largely dealing with the plaintiff companies; that is, the insurance agents and brokers. They would not be confused. As to the percentage of the public that would be affected directly, even if they would be at all confused, it would be a very negligible percentage, in the opinion of the court. It would be a slight percentage, at most.

It was surprising to the court, really that so many people who purchase policies of insurance know so little about it as they apparently do, from the testi-

mony here of those who are engaged in the business. One witness stated that in his view there would not be one-tenth of one per cent of his customers who would be concerned as to [299] the company with which he was placing his policy.

One man who had been engaged in business here in Los Angeles since last August stated that within that period he had written from 75 to 100 new contracts, and that his recollection was that only one person had made any inquiry as to the company with whom it would be placed.

I think this was his testimony in substance. The percentage was slight.

I think there could be no appreciable part of the public who would make inquiry regarding these matters when it comes to the purchase of their policies. Taking all of the testimony together I do not see how they could be confused by the use of defendant's proposed name.

Something was said by Mr. Stanbury in his argument as to the desire to take advantage of the name. It hardly seems to the court that it was justified, because this is not a situation where, after apparently long consideration, the name was selected. The defendant, in fact, selected another name, and then it was placed in the position where it had to select a name other than the first one determined upon.

Of course such intent might be manifest by a very short consideration of it, but taking it all together it just does not appear to the court that it would show the intent to trade upon the plaintiff's name or to profit in any way by [300] it.

I have taken longer now than I thought I would when I began. The plaintiffs' prayer is denied.

Mr. Stanbury: Your Honor has made his ruling, but to correct the impression you got, I never suggested or intimated that the defendant intended to trade on our name. I say the reason he won't take the name "Motor Club" is because he intends to trade on the Automobile Club's name. That was my point.

The Court: The Automobile Club of Southern California?

Mr. Stanbury: Yes. That was an aside.

The Court: We aren't concerned with that here.

Mr. Stanbury: I merely wanted to correct that impression. I never suggested that he was trying to trade on our name.

The Court: I am glad you did correct it. I didn't thing you would be making the argument unless it referred to plaintiffs, because we are not concerned here with the Automobile Club of Southern California.

Mr. Stanbury: No, but he said he was in love with the name "American" and not with "American Motor," however.

The Court: It was, really, just to attack the credibility of the witness in that statement?

Mr. Stanbury: Yes.

Mr. Rowe: There will be an order for [301] the defendant to prepare findings and submit them to opposing counsel?

The Court: Yes. [302]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of April, A.D. 1949.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed February 1, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 37, inclusive, contain the original Amended Complaint for Injunctive Relief; Answer to Amended Complaint; Plaintiffs' Exceptions to Proposed Findings, etc.; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Cost Bond on Appeal and Designation of Contents of Record on Appeal and full, true and correct copy of Docket Entries which, together with

original reporter's transcript of proceedings on January 4, 5, 6 and 7, 1949, and original Plaintiffs' Exhibits Nos. 1 to 14, inclusive and original Defendant's Exhibits A to O, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.75 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 21 day of February, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12484. United States Court of Appeals for the Ninth Circuit. American Automobile Insurance Company and American Automobile Fire Insurance Company, Appellants, vs. American Auto Club, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 23, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
Ninth Circuit

No. 12484

AMERICAN AUTOMOBILE INSURANCE COMPANY, a Corporation, et al.,
Plaintiffs,

vs.

AMERICAN AUTO CLUB, a Corporation, et al.,
Defendants.

STATEMENT OF POINTS

Throughout the United States the words "American Auto," when used in connection with automobile insurance, refer alone to these appellants and have thus, for automobile insurance purposes, acquired a secondary meaning. Clearly, and as a matter of law, respondent's proposal to sell automobile insurance as "American Auto Club" and to equip its members' cars with emblems bearing the words "American Auto" will cause confusion and injury. The judgment to the contrary is opposed to the evidence and is unsupported.

PARKER, STANBURY,
REESE & McGEE,

By /s/ RAYMOND G. STANBURY,
Attorneys for Appellants.

[Endorsed]: Filed April 24, 1950.

No. 12484

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN AUTOMOBILE INSURANCE COMPANY AND AMERICAN AUTOMOBILE FIRE INSURANCE COMPANY,

Appellants,

vs.

AMERICAN AUTO CLUB,

Appellee.

Brief of Appellants, American Automobile Insurance Company and American Automobile Fire Insurance Company.

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STATUTES

Specification of Errors.

I.

The Court erred in finding that the words "American Auto" have acquired no secondary meaning in the field of automobile insurance [Finding XI, Tr. 24-25], as the undisputed evidence shows the contrary, said finding being without evidentiary support.

II.

The Court erred in finding, expressly or impliedly, that the name "American Auto" and its secondary meaning, if any, have been abandoned by appellants [Findings V and VI; Tr. 22-23] because the evidence conclusively shows the contrary, said findings being without evidentiary support.

III.

The Court adopted an erroneous rationale in mistakenly assuming that no secondary meaning can attach to words which are not unique, and that a secondary meaning, to be protected, must be known to a substantial portion of the general public rather than merely to those with whom petitioners come in contact.

No. 12484

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN AUTOMOBILE INSURANCE COMPANY AND AMERICAN AUTOMOBILE FIRE INSURANCE COMPANY,

Appellants,

vs.

AMERICAN AUTO CLUB,

Appellee.

Brief of Appellants, American Automobile Insurance Company and American Automobile Fire Insurance Company.

Jurisdictional Facts.

Jurisdiction in this case is based upon diversity of citizenship and an amount in controversy in excess of $3,000.00 [Complaint, par. I, Tr. 2; Findings I, II, Tr. 20]. The value of appellants' business with which they seek to avoid unfair competition, was established by a premium income in 1947 of $35,000,000.00 [Tr. 53]. The applicable statute is Title 28, U. S. Code, Section 1332 and Section 1921. Jurisdiction is found in Findings I and II [Tr. 20].

Statement of Facts.

The issues are stated on a prefatory page. In this action the plaintiffs, American Automobile Insurance Company and American Automobile Fire Insurance Company, referred to herein as appellants, and known as "American Auto," seek to enjoin respondent's proposed entry into the automobile insurance and service field as "American Auto Club."

Appellant American Automobile Insurance Company was incorporated in 1911 and started to operate in 1912 [Tr. 21]. It writes chiefly automobile insurance, but also Workmen's Compensation, general liability, burglary and plate glass insurance [Tr. 54]. Its premium income for the year 1947, the latest year for which records were complete at the time of the trial, was $30,000,000.00 [Tr. 53]. Today its business is conducted in all of the forty-eight states [Tr. 53]. Its branch office in Los Angeles where respondent proposes to operate was opened in 1912 and has outstanding approximately 40,000 policies [Tr. 56]. The American Automobile Fire Insurance Company was incorporated in 1927 [Tr. 52] and since then has been doing business in all of the states writing principally fire, collision and inland marine insurance [Tr. 52-54]. The premium income for that appellant in 1947 was five or six million dollars [Tr. 53].

In 1943 appellants purchased the Associated Indemnity Company, a writer of Workmen's Compensation and general liability insurance, and the Associated Fire and Marine Insurance Company [Tr. 54]. Appellant American

Automobile Insurance Company is the parent corporation of all, paying the salaries of the employees of all four companies [Tr. 84].

The Court has found, as an undisputed fact, that appellants "are reputable and well regarded by other persons, firms and corporations engaged in the insurance business" [Tr. 21]. They have some two hundred agents and thirty-five claim adjusters in Southern California [Tr. 82-83]. Forty thousand policies are in effect in the Los Angeles area [Tr. 56] and in 1947 the sum of $1,474,340 was paid in settlement of claims in Southern California alone, to approximately 23,258 persons [Tr. 172, 179].

It was undisputed that appellants are known as "American Auto" and that no other person, firm or corporation in the automobile insurance or service field is known as "American Auto" or "American Automobile" or has either combination of words or any similar thereto in its name [Tr. 110-111, 118, 137, 142, 149, 150, 156, 158, 231]. Gilbert R. Schwarz, called by respondent, testified on cross-examination that when he hears "American Auto" he thinks of appellants [Tr. 231, 230]. Another witness called by respondent, Joseph D. Thomas, testified that no other insurance organization is known as "American Auto" or has those words or "American Automobile" as part of its name [Tr. 213-216]. He also produced a printed list of such organizations licensed in California proving this to be true [Ex. I, Tr. 203, 204-205]. It was not suggested by any witness that the words "American Auto" do not refer to these appellants nor that they refer

to anyone else. It is the contention of appellants that the words "American Auto," when used in the automobile insurance and service field, have acquired a secondary meaning referring to them [Comp. par VII, Tr. 4-5].

Appellants advertised extensively for many years as "American Auto" [Tr. 58-59]. This advertising was partly in newspapers but mostly by means of pamphlets distributed by their brokers and agents to the public. Many samples of this advertising material are in evidence as exhibits. Since the exhibits are in San Francisco as this is written they cannot be accurately described but are easily identified.

Between 1944 and the time of the trial appellants had discovered that the loss ratio on automobile liability insurance had become so high as to make that line unprofitable and in that period had done no advertising direct to the public [Tr. 173]. This is a temporary and not a permanent policy [Tr. 173].

Certain "institutional advertising" had been done in that period in insurance journale and trade papers as "American Associated Insurance Companies" [Tr. 85-87]. The trial court impliedly, if not expressly, found that appellants have abandoned the name "American Auto" [Finding VI, Tr. 22-23]. The evidence shows that, at appellants' request and expense, they were listed in the yellow, classified section of the Los Angeles telephone directory, in bold black type and in box form as "American Auto Insurance Co.," the box containing an advertisement [Tr. 198-199; Exs. 12, 13]. (Appellants are also listed in the

Los Angeles white directories as "American Auto Ins. Co." as well as "American Associated Ins. Co." [Tr. 78], although it appears that the regular white directory listing is dictated by the telephone company [Tr. 196-198].) In the yellow classified directory only the name "American Auto Ins. Co." is in the prominent form specially ordered and paid for. "American Associated" appears in the regular form determined by the telephone company and furnished without cost [Ex. 12, Tr. 198]. Appellant's vice-president testified that there has never been an intent to abandon the name "American Auto" [Tr. 75-76] and at all times appellants have advertised themselves in the classified directories as "American Auto." It was undisputed that the name "American Auto" has continued as an appellation designating appellants throughout and since the consolidation with the Associated Indemnity Company [Tr. 110, 119, 125, 141, 231]. The last of these transcript references is to the testimony of Gilbert R. Schwarz, respondent's witness, who testified to the current usage as of the time of trial.

Respondent has not yet commenced operations [Tr. 40].

It was organized in the summer of 1947 [Tr. 40]. It has no members [Tr. 51]. It is incorporated, *inter alios*, to act as insurance agents and brokers in obtaining, selling, and writing insurance of all kinds, including automobile insurance, and to furnish claim adjustment service in connection with automobile insurance [Tr. 38-39]. Its proposed prospectus so provides [Tr. 39]. In its original answer it admitted, by means of an express statement, that

it "proposes to enter the automobile insurance business and to sell, under the name of American Auto Club, various types of automobile insurance policies" [Tr. 245]. This answer was signed and verified by respondent's president [Tr. 245]. This admission was omitted from respondent's amended answer and respondent's counsel testified that the admission was a mistake of his own [Tr. 248-253]. Respondent's president further testified in his deposition, however, that he had intended approaching these appellants for a discount in the sale of this insurance respondent proposed to sell [Tr. 244], but this testimony was somewhat vaguely evaded by the witness at the trial [Tr. 244]. The organizers and stockholders of respondent operate, under another name, an insurance agency and brokerage business [Tr. 47] and respondent's president testified at the trial that otherwise unspecified applications for insurance would be referred by respondent to his own agency and brokerage firm [Tr. 47, 244]. It is admitted that respondent will furnish claim adjustment service in its own name, and that it will sell insurance at least through the aforementioned agency and brokerage firm of practically identical composition.

Respondent intends to placard the cars of its members with emblems bearing the words "American Auto Club" [Ex. 1, Tr. 41-42].

As soon as appellants learned of respondent's existence, they protested to respondent in writing against the use of the name "American Auto" [Complaint, par. IX, Tr. 5; admitted by answer, par. IX, Tr. 11].

ARGUMENT.

I.

The Evidence Conclusively Establishes That the Words "American Auto" Have Acquired a Secondary Meaning.

On the foregoing record, establishing the facts without dispute, the trial court declared that the words "American Auto" have not acquired a secondary meaning [Finding XI, Tr. 24-25]. We respectfully submit that the evidence establishes the contrary without dispute and conclusively. Each and every witness who was called to testify on the subject stated that the words "American Auto" connote, in the insurance field, these plaintiff appellants and no other firm, company or person. This was not only established by the testimony of the numerous witnesses called by appellants but by respondents also. Gilbert R. Schwarz, called by respondent, testified that when he hears "American Auto" he thinks of appellants [Tr. 231, 230]. Joseph D. Thomas, also called by respondent, testified that no other insurance organization is known as "American Auto," or has those words or "American Automobile" as part of its name [Tr. 213-216]. This witness produced, on behalf of respondent, a printed list of such organizations authorized to do business anywhere in the State, further proving this fact [Ex. I, Tr. 203]. A list of persons and companies licensed as agents or brokers in California was likewise introduced by respondent and proves the basic fact [Ex. J, Tr. 204-205]. It was conclusively proved, by oral and documentary evidence, not only that appellants are commonly known as "American Auto," but also that no other person, firm or corporation in the automobile insurance or service field is so known [Tr. 110-111, 118, 137, 142, 149, 150, 156, 158, 231].

Instead of attempting to prove the contrary, respondent's witnesses, upon cross-examination, confirmed the fact which stands uncontradicted.

It may well be asked what more an *insurance company* could do, to invest a nickname with a secondary meaning, than to have it understood, when the name is used, that it is referred to?

As shown in the Statement of Facts the appellants have been doing business in Los Angeles since 1912 and in every state in the Union during most of that time. In the year 1947, the last year for which complete records were available at the time of the trial, appellants' combined premium income was over $35,000,000 [Tr. 80]; in the Los Angeles area alone there were 40,000 policies outstanding [Tr. 56]; in that year alone and *in Southern California alone* the sum of $1,474,340 was paid out in claims to 23,258 persons [Tr. 172, 179]. It is perfectly obvious that these plaintiff companies, while not attempting to compete with Coca-Cola or other popular commodities, are of necessity known to a large number of people to whom, in connection with insurance, the words "American Auto" can refer to no one else.

One basic fallacy of the Court's reasoning was revealed in the oral decision (Sec. VII, *post,* this brief) but there is reason to believe that decision that the words "American Auto" have acquired no secondary meaning is further attributable to the mistaken belief that no such secondary meaning can be acquired unless the public *in general* is aware thereof, *i. e.,* that the product is notorious. Finding XI [Tr. 24-25], referred to above, appears to reveal this mistaken concept, the Court finding that "plaintiffs are not and neither of them is known to the *public* as 'American Auto' and the name 'American Auto' is not understood to be nor is it identified with plaintiffs or either of them

widely, commonly, publicly or generally: . . ." (Emphasis added.) It is perfectly obvious that the plaintiffs, either by their true names or by the established nickname, must of necessity be known to a large number of people in the only section of the public in which they can be interested, *i. e.,* those who have had occasion, or may have occasion, to deal with them. The Court has found, on evidence which is undisputed and as to which no attempted contradiction was made, that plaintiffs are "reputable and well-regarded" [Finding IV, Tr. 21]. Appellants genuinely pride themselves in observing an enlightened claim policy as well as a policy of good service to its policy holders [Tr. 81-83]. As is admitted respondent intends not only to operate an automobile service organization (including service regarding claims and the sale of insurance, as discussed hereinafter), but *to placard its members' cars with emblems bearing the words "American Auto."* Clearly the opportunity for confusion is thus magnified to an unusual degree. Persons involved in accidents with cars so emblemized are likely, in numbers which cannot be exactly calculated, to conclude that they have claims against the assureds of these plaintiff companies and to attribute to the plaintiffs the treatment they receive. As stated by plaintiffs' chief switchboard operator numerous calls, averaging four or five per day, are received by plaintiffs for persons wishing to contact the American Automobile Association (listed in the Los Angeles telephone directory as "American Auto Assn. Agcy"), a non-competitive organization [Tr. 161-162], referred to hereinafter (Sec. VI this brief).

It is obvious, to say the least, that of the thousands of persons who know appellants as "American Auto" there will be many who will reasonably assume that "American Auto Club" is a club affiliated with appellants.

The idea that a business which does not deal with the *whole* public, and therefore is not notorious may not protect its name as to those who do come in contact with it is, we respectfully submit, erroneous and contrary to the solidly established law. An automobile insurance company, like appellants, is entitled to such protection despite the limitation of its clientele. (*Aetna Casualty etc. v. Aetna Auto Finance,* 123 F. 2d 582.) The undisputed record of these appellants, showing their extremely sizeable operations in a field in which the words "American Auto" mean them and no one else, the large number of people with whom it is clear they must come in contact both as policy holders, claimants, and prospective purchasers of insurance, make it obvious that they have something of value to protect.

It also appears that the trial court was under the mistaken impression that the words "American" and "Auto" or "Automobile," being common and generic terms, are incapable of acquiring a secondary meaning [see Finding VIII, Tr. 22-23]. In a California decision decided in 1932, before the doctrine of secondary meaning had appeared anywhere in the California reports, and one in which that doctrine was not invoked or referred to, it was held that the words "American Automobile" are incapable of acquiring a secondary meaning because of their generic character. This case is *American Automobile Association v. American Automobile Owners Association,* 216 Cal. 125, 13 P. 2d 707. In that case neither the Court nor counsel were mindful of the existence of the secondary meaning doctrine, as is obvious from the opinion and from the subsequent emphatic statements to the contrary by the same Court in later cases. It is stated that no rights of any kind can be acquired by anyone in the words "American Automobile" or in any other common words. There

is no mention in the entire opinion of the secondary meaning doctrine nor to any principle akin to it; the Court discusses and applies decisions in which petitioners had asserted exclusive property rights, *technical trade-mark cases,* in which the rule actually is as stated by the Court. It was not suggested by the petitioner's counsel that the plaintiff had acquired any right to enjoin the use of a similar name by having imparted to the words a secondary meaning identifying them with itself.

It is obvious that the Court did not intend to abolish the secondary meaning doctrine, of which it was plainly not yet mindful. Had it had such an intent the case would now be overruled by its subsequent decisions altogether inconsistent with it when the secondary meaning doctrine has been the basis of suit. It is now held in California that the commonest words may become invested with a protectible secondary meaning.

The above case was decided in 1932. In 1933 it was followed in a factually weak case (*Fidelity Appraisal Company v. Federal Appraisal Company,* 217 Cal. 307, 18 P. 2d 950). Since 1933, it is interesting to note what has happened to *American v. American, supra.* It has been "explained," "distinguished" and ignored repeatedly *but it has never been followed.* (See *Rosenthal v. Brasley,* 19 Cal. App. 2d 257, at p. 260, 64 P. 2d 1109; *Milani v. Smith,* 85 Cal. App. 2d 163, 192 P. 2d 830; *Hoyt Heater Co. v. Hoyt,* 68 Cal. App. 2d 523, at p. 528, 157 P. 2d 657; *Brown v. Hook,* 79 Cal. App. 2d 781, at p. 797, 180 P. 2d 982; *Rosenthal v. Brasley, etc.,* 19 Cal. App. 2d 193, 64 P. 2d 1109; *Martin I. Rokeach, etc. v. Kubetz,* 10 Cal. App. 2d 537, at p. 541, 52 P. 2d 567; *The Carolina Pines v. The Catalina Pines,* 128 Cal. App. 84, 16 P. 2d 781.) The only actual distinction between *American v. American,*

supra, and the later cases is the obvious one that the secondary meaning doctrine was not thought of, presented or mentioned. The supposed distinctions made in the later cases in support of opposite conclusions are as illuminating of that fact as the one made in *Brown v. Hook, supra,* at p. 797, 18 P. 2d 982, 991:

> "It is true that 'Machinists' Union No. 68' consists of generic terms, and that generally the courts will not enjoin the use of a name consisting solely of generic terms (*American Automobile Assn. v. American Automobile Owners Assn.,* 126 Cal. 125) but where its use would be confusing and misleading the rule is different."

The California Supreme Court denied a hearing in the last cited case on July 20, 1947. The California Supreme Court's own later statement that *American v. American* does not apply when the secondary meaning doctrine is relied on is quoted below.

We respectfully submit that it may no longer be denied that the name "American Auto" may be invested with a secondary meaning which courts of equity will protect. Decisions are so numerous that it would be impossible to discuss them all in a brief of any reasonable length. We will therefore call attention to a number of representative decisions from both Federal and State Courts. The case of

Acme Chemical Co. v. Dobkin, 68 Fed. Supp. 601,

contains the results of an exhaustive research reviewing decisions up to the year 1946. Forty-five decisions bearing closely upon the present case are cited and discussed. Among other pertinent observations the Court expresses

a basic thought which, we respectfully submit, should be compelling in cases of this kind:

> "There is an important distinction between a corporate name and an individual name in respect to the manner of their acquisition. The corporation acquires its name by choice and *need not select a name identical with or similar to one already appropriated by a senior corporation* while an individual's name is thrust upon him." (P. 606; emphasis added.)

This same principle finds expression in a great number of decisions. In

> *British American Tobacco Co. v. British-American Cigar Stores Co.*, 211 Fed. 933,

the Court says (p. 935):

> "To change the defendant's name can injure no one, to retain it may mislead the public, confuse the trade and seriously injure the complainant's business. *When such an alternative presents itself, the duty of a court of equity is plain, viz., to stop the unfair proceeding in limine. . . . If the defendant intends to deal fairly, it can do no harm to change its name; if it intends to use the name unfairly, it should be compelled to change it.*" (Emphasis added.)

This defendant has not yet begun to use this similar and confusing name. There can be no compelling (and *bona fide*) reason for the defendant to insist upon the use of a name so similar to that of an established operator, that confusion may result. The Court in the *Acme* case, *supra*, goes so far in support of this equitable principle as to state that *"unless the junior business which is conducted under a name similar or the same as the senior business, is so formed and distinctly removed as to create absolute in-*

surance against the public confusing the two, it is unlawful." It is not necessary to go so far in order to afford these appellants the relief sought, but it is clear that the opportunity and therefore the duty to avoid confusion belongs to the respondent as the late arrival in the field. It has a wide choice of names which can cause no confusion.

The entire opinion in *Acme Chemical Co. v. Dobkin, supra,* should be incorporated herein by reference, not as controlling authority in itself, but as a brief which this Court may accept with the confidence that it is the product of impartial research and one which conveniently epitomizes a great number of decisions of other courts involving the issues of this case.

To avoid prolonging this brief to inordinate lengths attention is respectfully directed to the *generic or geographical* terms which have been protected in the cases cited:

Popular name "Academy" and "Motion Picture Academy", acquired by usage although not plaintiff's actual name, protected against "Hollywood Motion Picture Academy":

Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal. 2d 685, 104 P. 2d 650.

"Aetna Auto" protected when acquired by usage and advertising, although not plaintiff's actual name:

Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc., 123 F. 2d 582, 584.

"Jackman from California" protected against "Jackman of Hollywood":

Jackman v. Mau, 78 Cal. App. 2d 234, 177 P. 2d 599.

"Family" protected:

Rosenthal v. Brasley-Krieger Shoe Company, 19 Cal. App. 2d 257, 64 P. 2d 1109.

"Carolina Pines" protected against "Catalina Pines":

The Carolina Pines, Inc. v. Catalina Pines, 128 Cal. App. 84, 16 P. 2d 781.

Ninth Circuit—"Hudson Bay" protected by its secondary meaning:

Phillips v. The Governor and Company of Adventurers of England Trading Into Hudson's Bay, 79 F. 2d 971, 973.

Ditto:

The Governor, etc., Hudson Bay Fur Co., 33 F. 2d 801.

"British-American" protected:

British-American Tobacco Co. v. British-American Cigar Stores Co., 211 Fed. 933, 935.

"Continental" protected:

Continental Distilling Sales Co. v. Brancato, 173 F. 2d 296.

"American Products" protected:

American Products Co., a Delaware corporation, v. American Products Co., a Michigan corporation, 42 F. 2d 488.

"American Clay" protected:

American Clay Manufacturing Co. v. American Clay Manufacturing Co. of New Jersey, 198 Pa. 189, 47 Atl. 936.

"Western Auto Supply" protected against "Western Auto Salvage":

Western Auto Supply Co. v. Knox, 93 F. 2d 850.

"Acme" protected:

Acme Chemical Co. v. Dobkin, 68 Fed. Supp. 601.

"Great Atlantic & Pacific", commonly known as "A. & P." protected against "A. & P. Cleaners, etc.":

Great Atlantic & Pacific Tea Co. v. A. & P. Cleaners & Dyers, 10 Fed. Supp. 450.

Indian Territory Oil & Gas Co. v. Indian Territory Illumination Oil Co., 95 F. 2d 711.

"Universal" protected:

Universal Credit Corporation v. Dearborn Universal Underwriters Credit Corp., 309 Mich. 608, 16 N. W. 2d 91.

"Boston Wafers" protected:

C. A. Briggs Co. v. National Wafer Co., 215 Mass. 100, 102 N. E. 87.

"United Drug" protected:

United Drug Co. v. Parodney, 24 F. 2d 577.

"German-American" protected:

German-American Button Co. v. A. Heymsfeld, Inc. (German-American Hand Crochet Button Works), 156 N. Y. Supp. 223.

"Fox", in connection with fur business, protected against use by competitor to suggest proper name:

Fox Fur Co. v. Fox Fur Co., 59 Fed. Supp. 12.

"Philadelphia Trust" protected:

Philadelphia Trust, Safe Deposit & Insurance Co. v. Philadelphia Trust Co., 123 Fed. 534.

"High standard" protected where applied to paints and varnishes:

Lowe Bros. v. Toledo Varnish Co., 168 Fed. 627.

"French" protected where applied to ice cream:

French Brothers Dairy Co. v. John Giacin, 12 Ohio Circuit Court (N. S.) 134.

"Overland" protected:

Akron-Overland Tire Co. v. Willys-Overland Co., 273 Fed. 674.

The applicable authorities were epitomized by this Court in the case of *Stork Restaurant v. Sahiti,* 166 F. 2d 348, at page 361, as follows:

> "This thought that a newcomer has an infinity of other names to choose from without infringing upon a senior appropriator runs through the decisions like a leitmotiv."

Respondent's president testified that he desired the name "American Auto" because the word "American" appeals to him [Tr. 239-240]. However, when asked "Would your desire for the word 'American' be satisfied with the name 'American *Motor* Club'?" his answer was "No, sir." [Tr. 247.]

The evidence that "American Auto", in this field, means appellants and no one else, is undisputed. The finding to the contrary is without evidentiary support and is apparently attributable to a mistaken belief that a petitioner's product

must be in universal use before relief can be granted. It is solidly established, however, that a secondary meaning will be protected in equity to prevent confusion in any field. It would seem that such relief should be readily granted against a newcomer in the field, who has not yet commenced operations, in favor of long-established petitioners who have acted with extreme promptness.

II.

In Cases of This Kind a Reviewing Court Is as Favorably Situated as a Trial Court to Decide Whether Relief Should Be Granted.

Cases involving unfair competition through the use of similar names constitute one of the few categories in which an appellate court is as favorably situated as a trial court to determine whether confusion is likely to occur and whether relief should be granted. For this reason the decisions on this subject are replete with instances in which the higher courts have overruled conclusions of trial courts denying relief, and substituted their own final conclusions in lieu thereof. No research has been conducted for the purpose of compiling a special or complete list of such decisions but, of those consulted on other points, the following involve the substitution of the final conclusion of reviewing courts for those of the trial courts denying relief:

Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc., 123 F. 2d 582;

Stork Restaurant v. Sahiti, 166 F. 2d 349 (9th Cir.);

Lane Bryant, Inc. v. Maternity Lane, 173 F. 2d 599 (9th Cir.);

Little Tavern Shops v. Davis, 116 F. 2d 903;

San Francisco Assn., etc. v. Industrial Aid, etc., 152 F. 2d 532;

Peninsular Chemical Co. v. Levinson, 247 Fed. 658;

Vogue Co. v. Thompson-Hudson Co., 300 Fed. 509;

Aunt Jemima Mills Co. v. Rigney & Co., 247 Fed. 407;

Rosenberg Bros. & Co. v. Elliott, 7 F. 2d 962;

Greyhound Corp. v. Goberna, 128 F. 2d 806;

R. H. Macy & Co. v. Macy's Drug Store, Inc., 84 F. 2d 387;

Western Auto Supply Co. v. Knox, 93 F. 2d 850;

Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 72.

We respectfully submit that it is obvious that the respondent company, proposing to move into the automobile insurance and service field, to emblemize the cars of its members, and to come into juxtaposition with appellants' listing in the telephone directories, invites confusion. We respectfully submit that this is as obvious and inescapable as in any of the cases cited above which were decided as a matter of law.

III.

Evil Intent or Actual Confusion Need Not Be Proved.

It is well settled that an actual intent to deceive or to acquire an unfair advantage need not exist; the issue may be judged objectively.

Lane Bryant, Inc. v. Maternity Lane, 173 F. 2d 559, 564 (9th Cir.);

San Francisco Assn., etc. v. Industrial Aid, etc., 152 F. 2d 532;

Acme Chemical Co. v. Dobkin, 68 Fed. Supp. 601, 613 (6);

American Products Co., a Delaware corporation, v. American Products Co., a Michigan corporation, 42 F. 2d 488.

It is also unnecessary to prove that actual confusion has resulted. Manifestly it would be impossible to prove that actual confusion has resulted when the petitioners act promptly, as here, and seek to avoid the damage before it is done.

Universal Credit Corporation v. Dearborn Universal Underwriters Credit Corporation, 309 Mich. 608, 16 N. W. 2d 91 (1944);

Acme Chemical Co. v. Dobkin, 68 Fed. Supp. 601;

Fox Fur Co. v. Fox Fur Co., 59 Fed. Supp. 12, 15.

IV.

The Fact That Administrative Approval of the Name Is Granted Is Not Controlling.

It is admitted by the pleadings that as soon as appellants learned that respondent intended to do business under its present name they protested [Par. IX, Complaint, Tr. 5; admitted, par. IX, Answer, Tr. 11]. It was admitted by respondent's proprietor that it had not yet transacted business of any kind [Tr. 40, 41], and that it has no members [Tr. 51]. It was likewise established by the testimony of respondent's witness, a deputy in the office of the Insurance Commissioner, that at the time appellants discovered respondent's existence and protested to that department, the matter had left that department with the name already approved [Tr. 212-213].

The fact that articles of incorporation in an objectionable name are issued is not binding as "otherwise judicial review would be barred."

> *Universal etc. v. Dearborn Universal etc.,* 309 Mich. 608, 16 N. W. 2d 91, 95(4).

Furthermore, Section 310 of the Corporation Code of California provides:

> "The use by a corporation of a name in violation of this section may be enjoined notwithstanding the filing of its articles by the Secretary of State."

The same section provides that the Secretary of State shall not file articles in a name

> "which is likely to mislead the public or which is the same as, or resembles so closely as to tend to deceive, . . . (t)he name of a similar corporation which is authorized to transact business in this State."

These plaintiffs never had an opportunity to be heard either by the Insurance Commissioner or the Secretary of State.

V.

There Has Been No Abandonment of the Name "American Auto" by These Appellants.

It appears from the findings that the Court, after having mistakenly concluded that no secondary meaning attached to the name in the first place, impliedly found that the use of the name has been abandoned by appellants. In Finding V [Tr. 22] it is declared that prior to 1944 appellants advertised in trade journals under their complete names and also as "American Auto." It is also declared, in connection with various folders prepared by appellants for distribution to the public, that "these folders were not widely distributed among the public by said brokers or agents nor were any distributed to any substantial extent whatsoever." While this comment is parenthetical at this point, it should be noted that this finding contains rather definite proof of the mistaken belief that the whole public, or a substantial part of the whole public, must be affected before a protectible secondary meaning may be acquired. A statement that these advertisements in the name of "American Auto" "were not widely distributed among the public" and that they were not distributed "to any substantial extent whatsoever," is perfectly true if the public referred to is the whole vast American public, but it is completely untrue, and contrary to the evidence, when directed to that section of the public in which appellants are interested and as to which they are entitled to protection. Thus the evidence shows that these advertisements were distributed to appellants' patrons through appellants' agents [Tr. 132-133]. It is apparent, both in the declaration that no secondary meaning ever existed and in the statement that appellants' advertising was "not widely distributed among the public," that the decision of the trial court is based

upon the mistaken conceptions already discussed and those pointed out in VII, *post.*

We respectfully submit that the erroneous conclusion that no secondary meaning exists is sufficient to require a reversal of the judgment. The further finding that appellants had abandoned the name is likewise unsupported by any evidence whatsoever as will appear.

In Finding VI [Tr. 22-23] it is declared that appellants, since 1944, have advertised in trade journals as "American Associated" or "American Associated Insurance Companies," *and that since 1944 there has been an effort by appellants to have their company so known rather than as "American Auto."* The Court further declares that *"since 1944 neither of plaintiffs has made an attempt nor indicated any desire to become known as or to identify themselves or either of them with the name 'American Auto'"* [Tr. 23].

It is respectfully submitted that as appears below, there is no evidence whatsoever to support this conclusion of abandonment.

So far as we have been able to discover an abandonment of an established name has been found to have occurred in only one case (*Hanover-Star Milling Co. v. Metcalf,* 240 U. S. 403, p. 419, 60 L. Ed. 713, p. 720). In that case the petitioner had, for over thirty years before filing its petition, withdrawn all effort to sell the particular trade-marked product in the area in question, leading the Court to observe that "no greater evidence of abandonment by non-user of trade mark rights could reasonably be asked for."

In *Saxlehner v. Eisner & Mendelson Co.,* 179 U. S. 19, 45 L. Ed. 60, the Court states "acts tending to show an abandonment (are) insufficient unless they show an actual intent to abandon."

In *Greyhound Corporation v. Rothman,* 84 Fed. Supp. 233, affirmed in 175 F. 2d 893, it is stated that an abandonment "depends upon intention, express or implied, as evidenced by word or conduct."

It is true that since 1944 appellants have advertised in trade journals as "American Associated" and "American Associated Insurance Companies" but other indisputable and documentary evidence conclusively proves that there has been no abandonment of the appellation, "American Auto."

Pages from telephone directories from various large cities are in evidence and other pages are described in the record [Ex. C, Tr. 90-91; Ex. 13, Tr. 190-192]. In every instance it will be found that appellant American Automobile Insurance Company is listed, with varying abbreviations, as well as American Associated Insurance Companies. As this is written these exhibits are in San Francisco so that it has not been possible to make a fresh inspection of them. However, the record contains a full description of both the white and the yellow classified directories of the Los Angeles area. Respondent claims that its intention is to do business in that area only and therefore Los Angeles is the controlling area in this case. It was shown on cross-examination of an employee of the telephone company, called as a witness by respondent, that it is necessary for the subscriber to order and to pay for the kind of listing appellants employ in the Los Angeles classified directory, *i. e.,* listings *in bold black type and in box form.* This is the type of listing used by appellants [Tr. 198-199]. Respondent attempted to prove by this witness that the form of telephone directory listing is determined, routinely, by the telephone company, but this attempt backfired and the witness, as noted, testified that it

was necessary for appellant to request and to pay for such a listing [Tr. 198-199]. In the face of the finding that appellants, since 1944, have made an effort to be known as "American Associated," instead of "American Auto," and that they have made no "attempt *nor indicated any desire to become known as or to identify themselves or either of them with the name of 'American Auto,'*" the conduct of the appellants in presenting themselves to the public by means of this most direct approach, the telephone book, is extremely illuminating and is decisive. "American Associated," the name in favor of which appellants are supposed to have abandoned "American Auto" appears in the small regular type of the kind routinely used by the telephone company in the absence of special instructions, whereas "American Auto Insurance Co." appears in bold black capitals and in a box. The exact listing is "AMERICAN AUTO INSURANCE Co.," followed by a box containing the words "Automobile and General Casualty Insurance Day or Night call" followed by the address and telephone number of appellants [Tr. 76-77]. Following the box and in the type routinely used by the telephone company in the absence of special request appears "American Auto Insurance Co." just as "American Associated" appeared above the box. Exhibit 12 is a page from the Los Angeles yellow classified directory for 1947, which book was current at the time of respondent's organization [Tr. 198-199]. It is identical with the listing described above. It thus conclusively appears that in the very area in question appellants featured the allegedly abandoned name "American Auto" before any

thought of these proceedings could have been entertained and continuously to and beyond the time of respondent's organization, to and including the present time as may be ascertained from a reference to the now current Los Angeles classified directory. The allegedly favored name "American Associated" carries a routine listing only, and is not advertised or accentuated.

It further appeared that the telephone company had evidently intended to change the foregoing specially requested listing to "American Associated," but the records of the company were corrected by scratching out the word "Associated" and substituting the word "Auto" [Tr. 200].

In the face of this evidence of direct appeal to the public, we respectfully submit that it is impossible to arrive at a rational conclusion that the appellants have any intention whatsoever of abandoning the name acquired by such long usage. This is the most direct approach to the public. *Appellants expect to be looked for in the telephone directory by their patrons and any others who seek to reach them, as "American Auto," the name which they here seek to protect.* We respectfully submit that this is the strongest evidence both that the appellants are known as "American Auto," and that, far from desiring to abandon the name, they desire to continue to be so known. As already noted the evidence is undisputed and, had there been any dispute, this printed proof would strongly refute it. Before any law suit could have been contemplated appellants ordered and paid for classified telephone directory listings and advertising only in their commonly used

name. It is conclusively proved that no abandonment was ever intended and that none has occurred.

(Before leaving this subject it should be noted that the regular white Los Angeles telephone directory lists American Associated Ins. Co. and six entries below, "American Auto Ins. Co." [Tr. 78]. The white directory for the western section of the Los Angeles extended area, lists "American Auto Ins. Co." [Tr. 191]. The directory for the northwestern area does likewise [Tr. 191]. The other sectional directories were not referred to. There is no special classified directory for any of the outlying districts, the one received in evidence being applicable to the combined areas. The truth of the testimony of appellants' Vice-President that appellants have never intended to abandon the use of "American Auto" [Tr. 75] is indeed abundantly proved. We respectfully submit that it is an indisputable fact that there has been no abandonment of the name and that the finding of the Court to the contrary is plainly unsupported.)

Furthermore it should be noted that the advertising referred to as having been done since 1944 is of decidedly limited significance as evidence even tending to prove an abandonment. In recent years appellants found that automobile liability insurance produced high loss ratios so that no attempt was made to increase appellants' automobile insurance business [Tr. 173]. It is natural and consistent that under such circumstances appellants would not circularize any portion of the public with advertising of that line of insurance. This is not a case in which circulars, always printed in the name of American Auto, as shown

by the exhibits on file, have been changed to "American Associated" or to any other name. It is simply a situation in which no such advertising has been done in any name. This change in policy is not a permanent one, appellants' vice-president stating "we will undoubtedly try to develop it in the future when the proper time arrives" [Tr. 173].

It should also be noted that appellants are still currently known as American Auto as shown by the testimony, already referred to, by every witness questioned on the subject. Respondent's witness Schwarz testified that when he hears "American Auto" he thinks of these appellants [Tr. 231]. Neither he nor defendants' witness Joseph D. Thomas knows of any other insurance organization so designated [Tr. 214]. No attempt was made to prove the contrary because such attempt would necessarily be futile as shown by the printed lists of companies in evidence.

We respectfully submit that there is no evidence whatsoever to support any finding that appellants have abandoned this nickname by which they still appear to all interested persons through the media of special, paid listing in classified directories, and by which, to the exclusion of all other parties, they are still known.

Lastly it should be noted that while respondent denied, for lack of information or belief, that appellants have become known as "American Auto" [Par. VIII of Answer, Tr. 11, denying Par. VII of Complaint, Tr. 4-5] it did not plead abandonment.

VI.

Respondent Intends to Compete With Appellants and Is Authorized to Do So, Although Competition Is Not Necessary to the Relief Sought.

It is well settled that no competition between the parties is necessary in order to justify the granting of an injunction against a newcomer who proposes to do business under a confusingly similar name. Decisions to this effect are extremely numerous:

Organization granting academy awards in motion picture industry enjoins dramatic school: *Academy etc. v. Benson,* 15 Cal. 2d 685. The Court says at page 689: "But we perceive no distinction which, as a matter of law, should be made because of the fact that the plaintiff and the defendant are engaged in non-competing businesses. In situations involving the use of proper surnames in non-competitive businesses it has been held that where confusion was shown as likely to result the relief should be accorded to complaining party."

Automobile insurance company enjoins automobile finance company from using its nickname, "Aetna Auto," in its title: *Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc.,* 123 F. 2d 582.

9th Cir.—*Phillips v. The Governor, etc.,* 79 F. 2d 971, page 974 (4).

Grocery company enjoins cleaners and dyers: *Great Atlantic & Pacific Tea Co. v. A. & P. Cleaners & Dyers,* 10 Fed. Supp. 450.

Automobile manufacturer enjoins concern retreading tires: *Akron-Overland Tire Co. v. Willys-Overland Co.,* 273 Fed. 674.

Manufacturer of automobiles enjoins seller of radio tubes: *Wall v. Rolls-Royce of America,* 4 F. 2d 333.

Manufacturer of locks, keys, hardware, enjoins manufacturer of flashlights and batteries: *Yale Electric Corp. v. Robertson,* 26 F. 2d 972.

Injunction where no competition because no overlapping of territories: *Western Auto Supply Co. v. Knox,* 93 F. 2d 850.

Grower and wholesale distributor of tobacco enjoins retail seller of cigarettes: *British-American Tobacco Co. Ltd. v. British-American Cigar Stores Co.,* 211 Fed. 933.

However, it is quite clear that the respondent, despite an evasive denial at the trial, does intend to compete with these appellants both in the sale or insurance and in the rendition of claims service.

To begin with respondent's Articles of Incorporation provide in part as follows, speaking of its authorized powers:

"(a) To act as insurance agents and brokers in obtaining, selling and writing insurance of all kinds, including liability insurance and automobile insurance.

"(b) To act as agents, attorneys in fact, brokers, adjusters for individuals, firms, associations or corporations and particularly those owning, operating, using and maintaining motor vehicles. . . ."

"To furnish, in connection with the ownership, operation, use or maintenance of motor vehicles (4) any or all of the following types of motor service as defined in the Insurance Code of California: . . ."

"* * * claim adjustment, license and insurance services." [Tr. 38-39.]

The proposed Prospectus of respondent company provides in part as follows:

> "Insurance Service. The club will assist members in obtaining through a qualified agent or broker insurance covering liability of or loss by such member resulting from injury or damage to personal property arising out of an accident involving the ownership, maintenance, operation or use of a motor vehicle." [Tr. 39.]

The original answer filed by respondent contained the following admission:

> "Answering paragraph IX, this defendant admits that it proposes to enter the automobile insurance business and to sell, under the name of American Auto Club, various types of automobile insurance policies." [Tr. 245.]

This admission was omitted from respondent's amended answer and respondent's counsel testified that the alleged error was his [Tr. 248-253]. However, this admission was not a technical one consisting of a failure to deny, but was express, and the answer containing it was sworn to by respondent's president, the same witness who attempted to deny the truth thereof at the trial [Tr. 254]. Furthermore, this same witness testified, in his deposition, that he intended to approach Mr. Sessions, appellants' vice-president, to see if appellants would offer a "good enough discount for us to operate" [Tr. 244].

It was also shown that the witness, as a partner of "Muller Brothers," is in the insurance business, being

licensed as agent for two insurance companies writing a general line of automobile insurance [Tr. 244]. The witness and his brother are the owners of the business known as "Muller Brothers" [Tr. 47]. The witness, his brother and his wife are the stockholders of respondent [Tr. 47]. The witness admitted that "Any reference of insurance would be referred to Muller Brothers" [Tr. 47], although he also stated that if another company was specified the member would be referred elsewhere [Tr. 48].

It is clear that respondent, authorized to transact an automobile insurance business, having issued a prospectus declaring that purpose, having originally admitted that intention under oath, having an identity of stockholders with an insurance brokerage firm to which it still admits an intention to refer applications for insurance, is proposing to enter into direct competition with these appellants on all fronts. The assumption that respondent's proprietors, in their capacity as insurance agents, qualifying as some of the "experts" referred to in Finding X, will jealously protect the rights of these appellants while at the receiving end of a telephone and otherwise in direct contact with persons believing themselves to be addressing appellants, is an assumption which cannot and must not be made in these proceedings. In the absence of this direct competition we respectfully submit that appellants are entitled to protection against the possible effects of a claim policy inimical to their own, and to the confusion inevitably resulting from the *placarding of automobiles on the public streets,* and are entitled to protection before

damage is done. In the face of actual competition we respectfully submit that the need for protection is multiplied.

(Parenthetical reference should be made to the American Automobile Association. It is the only other person, firm or corporation in any field related even to automobile service, which includes in its name the word "American Automobile" or any likeness thereof. It is established by uncontradictory evidence that the American Automobile Association issues no policies directly or indirectly, that it does not deal with the public directly at all, but only through member clubs with different names, and that it is never referred to as "American Auto" [Tr. 56-58, 109, 118, 127-128, 156, 158-159, 161, 213-214, 215-216]. The witness whose testimony is referred to in the last reference above [Tr. 213-216] was called by respondent. The American Automobile Association is referred to as "Three A's," "Triple A" and "A A A" [Tr. 72, 128]. It is not suggested by anyone that the American Automobile Association is either competitive, engaged in any similar field or that it is ever referred to as "American Auto" or "American Automobile." It is a parent organization affiliated with a large number of local automobile clubs, each one operating under a local name and not using the name American Automobile Association [Tr. 57].)

As already noted no witness suggested that "American Auto" refers to anyone other than these appellants and all admitted that "American Auto" signifies these appellants.

VII.

The Decisions Cited by the Trial Court Are Inapplicable.

After the parties had rested, arguments had been completed, and the case submitted, the trial court, in the oral decision, cited two decisions which manifestly played an important part in forming the Court's opinion [Tr. 260]. Unfortunately appellants being unaware that the Court considered such decisions to be in point (they not having been cited by respondent), were unable either to read the same or to comment upon them. That which purports to be a quotation from the opinion in one of these cases [Tr. 260] is not such but is a paraphrasing of part of the decision giving a misleading impression so that counsel, hearing such comment, could not possibly comprehend what the cases actually held.

These decisions, relied on by the Court, are *Selchow & Righter v. Western Printing and Lithographing Company,* 47 F. Supp. 322, and *Steem-Electric Corporation v. Herzfeld,* 118 F. 2d 122.

They are cases holding that one who has no exclusive right to the *name of a product,* and who can have none because the name is either the *true name of the article* or is *generally used,* cannot prevent competition unless the *product* is associated by the public with the *producer.*

The trial Court confused the references to "the public," made in the cited cases only in the connection stated above, with the thought that the public, *in general,* must be substantially affected before relief will be granted. Please note that after quoting from these decisions the Court stated [Tr. 261]: "As to the percentage of the

public that would be affected directly, even if they would be at all confused, it would be a very negligible percentage, in the opinion of the Court. It would be a slight percentage, at most." This statement is perfectly true if the entire public is considered. To qualify for equitable relief by such a standard a petitioner would have to be notorious. Clearly appellants, like anyone else seeking to avoid confusion with another, is interested in protecting itself with reference to that section of the public with which it comes in contact, whether the thousands with whom it, like these appellants, necessarily come in contact is a large or small percentage of the whole public.

A reference to the facts of these cases discloses their dissimilarity to the present case. In *Selchow etc. v. Western Printing etc., supra,* the plaintiff, a manufacturer of the game known as "Parcheesi," sought to enjoin the defendant from selling a game known as "Pachisi." First the Court found that the game of "Parcheesi" is a Hindu game, correctly known as "Pachisi," and declared that one who "first introduces a foreign game" may not, by slightly changing its name, prevent others from selling it under its true name (p. 325). (This is tantamount to saying that one could acquire no proprietary interest in the game of chess by calling it "chiss.") In view of the foregoing it was further expressly stated that the only basis upon which relief could have been granted was upon the theory of secondary meaning but that this theory could not prevail because the defendant had carefully adopted a dissimilar and distinguishing wrapping for his product, correctly named, and on which he used his own name. Denying the injunction the Court said:

> "The plaintiff here has proved that buyers for large department stores and other like establishments

> have for years associated the name 'Parcheesi' with the plaintiff company but that does not hold true as to the general public, for it is very evident that an ordinary customer, going into a store and asking for the game 'Parcheesi' has no information as to who might have manufactured and produced that game. Not one purchaser in a thousand would know or care whether Selchow & Righter Company was the manufacturer. The fact is that the public in general knows Parcheesi as a game and not as an article made by the plaintiff."

It is obvious that an insurance company, selling promises and service, produces no product which its patrons and others with whom it deals can know as a product disassociated from itself. It is impossible to conceive of a claim against American Auto, or of an insurance policy issued by American Auto, in terms apart from American Auto. A debt or a promise is nebulous and meaningless except when considered in terms of the debtor or promisor and it is most unfortunate that the trial court, unknown to counsel before the case was decided, perceived an analogy between such a case and the sale of a tangible product which, because of its own particular nature, was incapable of being the subject of a protectible interest. Even in the field of tangible products a petitioner will be protected if his product is associated with himself as the intangible "product" of these appellants must necessarily be.

In the other case cited, *Steem-Electric etc. v. Herzfeld, supra,* plaintiff, the manufacturer of an iron called "Steem-Electric," sought to enjoin defendant's use of the name "Steam-O-Matic" (p. 124). Aside from the fact

that the two names are not similar, the Court points out that many concerns had used the name "Steam-Electric" both before and after plaintiff's entry into the field, and that plaintiff could not, by changing one letter, acquire special rights in the commodity (p. 126).

The express holding of these cases is that a trade-name acquires a secondary meaning "if, in the minds of the public, it means the producer rather than the product" (p. 126), and not otherwise. Clearly the promises made by appellants, the service offered by it and the service rendered in the satisfaction of claims or the defense of actions, are associated with appellants as the "producers" of the "product," and the cases cited are not germane to any issue of the present case.

The basic misconception expressly revealed above takes form in Finding X [Tr. 24] wherein the Court declares that insurance brokers and agents are experts who will not be confused by the similarity of the names and will not confuse the identities of the parties. Before this fact, if it be a fact, can be of comfort to appellants it will be necessary to make two assumptions. The first is the naive one that all such experts, including respondent and its brokers and agents, will at all times act impartially and in good faith and will not capitalize upon any confusion which will result. The other assumption is that appellants contact the public only through brokers and agents. It is true that its policies are sold through brokers and agents but it is obviously in direct contact with thousands of persons, the number of paid claimants in 1947 in Southern California alone being 23,258, receiving the sum of $1,474.34 [Tr. 172, 179]. *Furthermore it is clear*

that respondent's open and widespread proclamation of "American Auto Club," through the emblemization of its members' cars, will not be confined to "experts" and there will inevitably be persons to whom appellants are well known who will conclude, to say the least, that the "American Auto Club" is an affiliate of theirs.

It has been shown that four or five calls per day are received by appellants from persons wishing to contact the American Automobile Association [Tr. 161-2]. It cannot be assumed that respondent, inevitably receiving calls intended for these appellants, will discourage such confusion. The gist of this action is that the confusing use of a similar name places it beyond the power of appellants, in a degree which cannot be calculated to control its reputation as well as its patronage.

As stated above the foregoing decisions were not cited by respondent. Counsel for respondent did, however, cite the case of *Standard Accident Insurance Company v. Standard Surety & Casualty Company,* 53 F. 2d 119, a written decision of a trial court in the Southern District of New York [Tr. 120]. In that case the plaintiff Standard Accident Insurance Company attempted to enjoin the defendant Standard Surety & Casualty Company from using the word "Standard" in its name. The judge stated, among other things (no doubt upon the evidence before him in that case), that 95% of the public does not care with whom they carry casualty insurance and that the other 5% are insurance experts such as the insurance

managers of large industrial corporations who investigate the records and resources of companies applied to (p. 120). The judge also stated that he was favorably impressed by the defendant's president and believed that there was no danger of anything being done to increase the confusion (p. 120). It is also pointed out that the witnesses had disagreed as to whether the word "Standard" had become synonymous with plaintiff's name (p. 121). The defendant had, for nine years, been operating a fire insurance company as Standard Insurance Company of New York (p. 120). In the case at bar it is not disputed that "American Auto" refers to appellants; respondent has not commenced operations; "American Auto," while composed of generic words, is clearly more distinctive than the single word "Standard." Thus in *Aetna Casualty & Surety Company v. Aetna Auto Finance,* 123 F. 2d 582, the Court stated that while there may be many cases in which the single word "Aetna" standing alone would not be relieved against, the combination of "Aetna Auto," being completely suggestive of plaintiff (as a nickname), would be (p. 584). A decree denying an injunction was reversed. In the case at bar, were there no other circumstances, respondent's plan *to place emblems upon its members' cars* distinguishes *Standard Accident Insurance Company v. Standard Surety and Casualty Company, supra,* and makes it clear that *this is not a case in which appellants can obtain protection through the intervention of experts between itself and the public.*

Conclusion.

It is respectfully submitted that the evidence in this case is undisputed. The respondent, not having commenced its operations, is able to do business as "American Motor Club" or under a variety of other names which can cause no confusion. It is respectfully submitted that it is inequitable, as a matter of law, to deny relief in this case. As has been shown, this Court and reviewing courts in general have freely substituted their conclusions for those of trial courts in cases of this kind, on factual records no more clear, the proper conclusion to be drawn being as readily apparent to an appellate court as to a trial court. It is respectfully prayed that the judgment be reversed with directions to grant the injunction.

Respectfully submitted,

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No. 12,484

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN AUTOMOBILE INSURANCE COMPANY and AMERICAN AUTOMOBILE FIRE INSURANCE COMPANY,

Appellants,

vs.

AMERICAN AUTO CLUB,

Appellee.

BRIEF FOR APPELLEE, AMERICAN AUTO CLUB.

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No. 12,484

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BRIEF FOR APPELLEE, AMERICAN AUTO CLUB.

I.

PRELIMINARY STATEMENT.

Appellants, who were plaintiffs below, sought an injunction prohibiting the use by appellee of appellee's corporate name. They have appealed from an adverse judgment rendered by the Honorable C. E. Beaumont. Appellee concurs in the statement of jurisdictional facts set forth in appellants' brief, page one.

This matter depends primarily upon factual questions, and in their brief, appellants have failed to

present either the basic factual issues or the basic legal principles upon which this case turns. Instead, they have passed quickly over the important facts, and have established at some length, legal principles which appellee has never attacked. As will appear in our statement of facts, the case is quite different from that presented by appellants' brief. Briefly, appellee's position, and the decision of the trial Court is this:

Appellee is not an insurer; its business is that of a motor club, the function of which is wholly different from an insurance business. Appellants are insurers, and as far as insurers are concerned, similarity of names (almost to the point of identity) is the rule. For example, there are 65 insurers having the word "American" as the first word in their names; more than 50 having the word "National"; more than 12 having "United States"; more than 10 having "Southern" or "Central" or "Western"; more than 10 having "Associated" or "Farmers" or "General".* There is a reason for this. Casualty and surety companies make no direct appeal to and do not do business directly with the general public, as do life insurance companies. Casualty and surety companies do business with licensed, experienced, agents and brokers, who have their own clientele. The established practice is for this clientele to order insurance coverage from

*This is but a partial list. See Deft.'s Exh. O for a more complete statement. See also *Standard Accident Insurance Co. v. Standard Surety & Casualty Co.* (D.C. S.D. N.Y.), 53 Fed. 2d 119, at p. 120.

their particular agent or broker, who, in turn, places it with whatever insurers he wishes. The good will of casualty and surety companies exists only among such agents and brokers, and it is such people that these insurers solicit. The public places its faith in the agent or broker, and in the existence of state regulatory measures, and is not educated to and does not place reliance upon particular companies.

The licensed agents and brokers are experts in the field of insurance and are familiar not only with the identities of the various companies and the very clear distinction between a motor club and an insurance company, but are also well acquainted with the personnel of the various insurers with whom they place their business. They are not confused by the 65 insurers having "American" as the first word of their names, or by the 50 using the word "National", etc.

The words involved in the instant case are "American Auto". It is agreed by the parties that since these are geographical, generic terms, no *property right* in them can be acquired by any person. Therefore, appellants may not claim the protection of any property right in the name itself. It is also conceded, however, that this fact is not determinative of the instant case. In addition to protecting names in which a property right has been acquired, Courts will prohibit, as unfair competition or an unfair trade practice, the use by another of a name in which no property rights inhere but which is being used for the purpose of, or the use of which will result in, confu-

sion in the minds of the people with whom the two firms deal; the consequences of this being an unfair advantage to the second user or a misleading of such consumers.

The standard by which cases falling into this latter category are decided is the doctrine of "secondary meaning". This phrase ultimately means that where one firm has become known to the people with whom it deals by a certain name, another firm will not be allowed to use the words constituting that name where the result of such use would be to induce the customers of the first firm to think that it was still dealing with the first firm when it was actually dealing with the second firm.

It is established in this case that appellants have made no efforts of any importance since 1944 to identify themselves by the term "American Auto"; and that appellants do not deal directly with the public but with an enlightened group of experienced agents and brokers among whom no confusion would result from the use by appellee in its business of the name American Auto Club. There can be, therefore, no identification by these people of appellee with appellants, and there is no basis upon which appellee should be prohibited from using its name.

This is the case tried in the District Court and this is the case brought before this Honorable Court for review.

II.

STATEMENT OF FACTS.

By this action appellants American Automobile Insurance Company and American Automobile Fire Insurance Company, whose business is chiefly that of casualty insurance,[1] seek to enjoin appellee, American Auto Club, from conducting the business of a motor club under the name which it has taken. Appellee does not intend to conduct an insurance business, nor does it intend to enter the "service field"[2] in which appellants perform services.

Appellee is a corporation organized, existing and certified as a motor club under the laws of the State of California.[3] It may and it will sell and offer for sale and furnish to persons who become its members,[4] motor club services such as towing service, emergency road service, bail bond service, discount service, financial service, buying and selling service, theft service, map service, towing service, claim adjustment service, license service, insurance service, hunting, fishing and camping service. It will also furnish to its members a protective emblem.[5] Neither these identical services nor an emblem are furnished by appellants to their assureds. Appellee's service contract with each of its members contains, as is required by law, "a statement in not less than fourteen-point modern type at the head

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[1]Tr. p. 54.
[2]Appellants' Opening Brief, p. 2; Tr. pp. 42 and 43.
[3]Calif. Insurance Code, §§ 12140-12511. Deft's Exh. M.
[4]Ibid. §§ 12142-12144.
[5]Pltf's Exh. 1.

of said contract stating 'This is not an insurance contract' ".[6]

The claim adjustment service offered by appellee to its members consists of putting its members, who have claims against an insurance company, in touch with the adjuster for the insurance company and assisting, if possible, in securing a proper adjustment.[7] The insurance service offered by appellee to its members consists of referring them to licensed agents or brokers through whom casualty insurance can be procured.[8] Appellee is not licensed to sell insurance.[9] These services do not conflict in any real way with any services furnished by appellants to their assured.

Appellee was organized in 1948 by the Muller brothers of Hollywood, California. The Muller brothers, shortly after World War I, established and now operate a service station and garage business in Hollywood, California. Over this period of time they have built up a large institution in which about 175 people are employed and over a million dollars is invested.[10] For approximately fifteen years prior to 1948 the Muller brothers, as a partnership, among other things, conducted an official garage for the Automobile Club of Southern California. During that time the partnership acquired, for the operation of this business, several hundred thousand dollars worth of equip-

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[6]Calif. Ins. Code, § 12252. Pltf's Exh. 2.
[7]Tr. p. 44.
[8]Tr. pp. 46-51.
[9]Tr. p. 217.
[10]Tr. p. 236.

ment consisting of, among other things, tow trucks, pickups, battery service trucks, and tire service trucks. Its connection with the Automobile Club of Southern California was terminated in 1947 through a political maneuver over which the partnership had no control. Then to utilize this equipment, maintain contacts with its customers and to secure repair work for their garage, the Muller brothers caused appellee to be organized.[11]

Appellee was incorporated under the name Auto Club of Hollywood. Its name was submitted for approval to the Insurance Commissioner of the State of California, as is required by law.[12] The Insurance Commissioner refused to approve for appellee either the name Auto Club of Hollywood or Automobile Club of Hollywood.[13] Thereafter appellee chose its present name, American Auto Club, which was approved by the Insurance Commissioner.[14]

Appellants' principal business is the writing and selling of automobile insurance of various kinds.[14a] In their own words, appellants conduct "their business only through accredited agents and brokers".[15] Appellants have no customers other than these accredited agents and brokers through whom all of the insurance they write is sold.[16] Each of these ac-

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[11]Tr. pp. 236-7.
[12]Insurance Code, § 12194.
[13]Tr. p. 212.
[14]Tr. p. 205.
[14a]Tr. pp. 52-54.
[15]Deft's Exh. N. Tr. p. 103.
[16]Deft's Exh. N.

credited brokers or agents has his own clientele.[16a] In advertisements directed to such agents and brokers, appellants say, speaking of their branch offices, that each is a miniature "home office", always ready to help you serve "your customers".[17]

In purchasing for their clientele such insurance as is written and sold by appellants, these accredited brokers and agents *in practically every instance themselves select the company* with which the insurance is placed; and this testimony is without conflict.[18] These accredited agents and brokers are well informed within the field of insurance and are well aware of the identities of the insurance companies with which they deal and with whom they place their business. They are trained to as nearly as possible a professional capacity[19] and they regard themselves as professional men in the insurance field.[20] No confusion will result among them because of any similarity between the names of appellants and appellee.[21] Appellants' contact with their assureds is in connection with claims, which of necessity have arisen out of insurance already purchased.[21a]

Except for a period of approximately three weeks in 1936, appellants have never advertised in any newspapers of general circulation or other media of gen-

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[16a]Tr. pp. 119, 138, 159 and 219-229.
[17]Deft's Exh. N.
[18]Tr. pp. 114-122, 139-154, 159-221, 229.
[19]Tr. pp. 136-7.
[20]Tr. p. 114.
[21]Tr. pp. 114-5.
[21a]Tr. pp. 82-4.

eral circulation among the general public under the name of "American Auto" or otherwise.[22] Appellants' advertising has been confined to trade journals circulating among persons in the insurance business,[23] and to folders sent to agents and brokers for distribution by them.[24] There is no evidence that these folders or "stuffers" were widely distributed, and such distribution as there may have been ceased in 1944.[25]

In 1944 appellants, who are under "common ownership" and management, acquired two other insurance companies, Associated Indemnity Company and Associated Fire and Marine Insurance Co., the employees of all of which companies are paid their salaries by American Automobile Insurance Company.[26] Since the acquisition of these companies, appellants have not tried to develop or increase their automobile insurance business.[27] They have stopped any advertising for that business. Such advertising as appellants have done since 1944 has appeared in trade journals and has featured "American Associated" and "American Associated Insurance Companies" and not "American Auto".[28] Appellants have adopted and use on their letterheads and insurance policies and elsewhere an emblem featuring "American Associated". On such

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[22]Tr. pp. 65-69.
[23]Tr. pp. 61-66. Deft's Exh. N; Pltf's Exh. 3.
[24]Tr. pp. 69-71.
[25]Tr. pp. 70, 150-1.
[26]Tr. pp. 83-86.
[27]Tr. p. 173.
[28]Deft's Exh. N.

advertising and on such policies and elsewhere, when appellants' names appear, each is spelled out in full.[29]

In doing this appellants were following a trend in insurance circles of having insurance companies under common ownership known by a group name, such as "Loyalty Group" and "Royal". [29a]

Prior to 1944 appellants' Los Angeles telephone operators answered appellants' telephone by saying "American Auto". Since 1944 the answer has been changed to "American Associated".[30]

In the Los Angeles telephone directory appellant American Automobile Insurance Co. is listed as American Auto Insurance Co.,[31] but in greater St. Louis, its home office, it is listed as American Automobile Ins. Company.[32] In each instance appellant's name follows the listing American-Associated Ins. Co.[33] In the San Francisco, Calif., Washington, D. C., Minneapolis, Minn., Detroit, Mich. and Baltimore, Md. telephone books and others appellant American Automobile Insurance is listed with the word "Automobile" spelled out in full. In several of these books also appear other businesses in whose names the words "American Auto" appear.[34]

In 1947 there were approximately 33 insurance companies authorized to transact business in California

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[29]Pltf's Exh. 11 and Deft's Exh. B.
[29a]Tr. pp. 229-230.
[30]Tr. p. 163.
[31]Tr. p. 76.
[32]Tr. p. 90.
[33]Tr. pp. 78 and 90.
[34]Tr. pp. 96-100.

whose names start with the word "American".[35] There are also in California eight companies listed as agents or brokers whose names start with the word "American".[36] Best's Insurance Guide[37] for 1948 lists approximately 65 insurance companies whose names start with the word "American".

In the selection of its name appellee had no intent to capitalize upon or take advantage of any similarity which exists between its name and appellants' names or either of them. Appellee's name was selected in good faith.[38]

III.

ARGUMENT.

A. PRELIMINARY STATEMENT.

As we have stated above, this case presents this very simple issue: Where it is established that the use by appellee of its name will cause no confusion and no damage to appellants or their business and will result in no unfair competition or unfair trade practice, and the people who are aware of appellants' existence will not identify appellee with appellants, is it not proper to refuse appellants injunctive relief?

The adequacy of appellants' statement of facts, and the inferences which they draw, are challenged by

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[35]Deft's Exh. I.

[36]Deft's Exh. J.

[37]Deft's Exh. O. In the insurance field the similarity between names is very marked, as will appear from an examination of this exhibit.

[38]Tr. pp. 262-3.

appellee, as is apparent from the documented restatement of facts contained in this brief. On the other hand, most of the law contained in appellants' argument is readily conceded by appellee. This law, of course, depends for its application upon the existence of facts to support it. The cases cited by appellants are supported by facts. The instant case contains no factual basis for the issuance of an injunction under those rules of law. We will first discuss appellants' brief, and then demonstrate that the judgment of the trial Court was correct.

B. APPELLANTS' BRIEF.

On pages 10-18 of appellants' brief, it is argued that geographic, generic words in a name may, in a proper case, if they have acquired a secondary meaning, form the basis of an action for an injunction to prohibit unfair competition or unfair trade practices. This, of course, is conceded by appellee.

On page 21 appellants argue that approval of appellee's name by the California Insurance Commissioner is not conclusive of this proceeding. That, too, appellee concedes.

On pages 22 to 28, appellants argue that they have not abandoned the name American Auto. Appellee does not agree with this claim, but it is immaterial and the Court made no finding of any such abandonment. The point is that the evidence showed that since 1944 appellants have sought to become known as "American

Associated Insurance Companies" and "American Associated", and have done no advertising in connection with automobile insurance or otherwise under the name American Auto. This obviously is very relevant evidence on the issue of whether appellants are so identified by the term American Auto that unfair competition will result among uninformed people by the use by appellee of its corporate name.

On pages 29-33 of their brief, appellants seek to establish the fact that appellee intends to compete with them. Although appellee's articles of incorporation are, like all articles, broad, and would permit it to do an insurance agency or brokerage business, it is not licensed to do so and does not intend to do so.[39] More important, appellee will be dealing directly with the public and offering the services of a motor club. Appellants on the other hand simply write insurance and acquire their business solely through the enlightened agent and brokers who act as independent middlemen.

In these first 34 pages of its brief, appellants seek to establish as a matter of law that they have become known generally by the name "American Auto", that such term has acquired a secondary meaning and that confusion will inevitably result from the use by appellee of its name in a different field. To support this claim appellants rely ultimately upon two facts: (1) In the Southern California telephone directory it lists its name as "American Auto" as well as Ameri-

[39]Tr. pp. 42 and 43.

can Associated Companies; (2) It receives an average of four or five calls a day from persons wishing to contact the American Automobile Association, rather than applicant.

It seems self-evident that this testimony supports appellee's position. It certainly does not tend to prove that *appellants* are known as "American Auto."

If the public knew only appellants as "American Auto", how could they telephone appellants when they were trying to reach the American Automobile Association? Obviously this group of people does *not* identify appellants by the name "American Auto" for they call appellants in the belief that appellants are someone else. If there is any conclusion to be drawn from this evidence, it is that appellants are unfairly identifying themselves with the American Automobile Association, and that they should not list their name in the directories in a manner which thus invites such confusion.

Although American Automobile Association is a "motor club", as is appellee, there is no evidence that appellants, in spite of the identity of names, ever took any action to cause it to change its name. The existence of the case of *American Automobile Association v. American Automobile Owners Association,* 216 Cal. 125, 13 Pac. (2d) 707, affords judicial notice of the fact also that there is a third motor club of almost identical name, which appellants apparently have felt would invite no confusion.

The argument made by appellants to the effect that it is a very simple matter for appellee to select a name wholly different in all respects from that of appellants overlooks several things. To begin with, appellee's name is not its first choice. It originally took the name *Automobile Club of Hollywood.* It was only when the Insurance Commissioner did not approve this name that appellee adopted the name *American Auto Club.*

The second point overlooked is that a mere reading of defendant's Exhibit O (containing the list of corporate names) shows that there is no name which appellee could adopt which would not be subject to some kind of attack similar to that made by appellant.

At some point appellee had to take a stand and since its present corporate name was declared satisfactory by the Insurance Commissioner of the State of California in spite of the existence of appellants, appellee drew that line with its present name.

The remaining portion of appellants' brief approaches the real issue in this case and our answer to it is contained in the statement which follows of appellee's position.

C. UNDER ESTABLISHED PRINCIPLES OF THE LAW OF UNFAIR COMPETITION, APPELLANTS ARE NOT ENTITLED TO THE INJUNCTION SOUGHT.

As stated, the evidence established not only that appellants' name is not unique among insurance companies but that it does business not with the general public but with licensed agents and brokers who in turn deal with the public. These licensed agents and brokers, experts in the insurance field, then place insurance with the companies. They develop a clientele which relies upon them to select the company best suited to write the insurance ordered from them. It is established that these agents and brokers would not be confused or disturbed by the existence of appellee as a motor club under its corporate name, and would not identify appellee with appellants (which is the crux of any question of "secondary meaning"). There could therefore be no damage to the business or reputation of appellants. Further, it must be remembered that it was appellants' burden to show that they were known to the uninformed and inexpert public as "American Auto" and that confusion would result, to its damage, from the existence of appellee. They have not only failed to establish these facts but they didn't even undertake to do so.

Under these circumstances the law is clear.

In *Nims on Unfair Competition and Trademarks,* Vol. II, page 1033, it is stated:

> "Banks, investment houses, insurance companies and similar concerns usually have a clientele so experienced and discriminating that the

probability of confusion is considerably reduced, and the names of such concerns are adequately distinguishable even though they are so similar that if a different type of business were involved, confusion would be inevitable."

In support of this text, the author cites:

Fidelity Bond & Mortgage Co. v. Fidelity Mortgage Co. (C.C.A. 6, 1926), 12 Fed. (2d) 582;

Fidelity Bond & Mortgage Co. v. Fidelity Bond & Mortgage Co. of Texas, (C.C.A. 5, 1930), 37 F. (2d) 99;

Lawyers Title Insurance Co. v. Lawyers Title Insurance Corporation (C.A. D.C. 1939), 109 Fed. (2d) 35, 45; 43 P.Q. 166.

Standard Accident Ins. Co. v. Standard Surety & Casualty Co. (D.C., S.D.N.Y.), 53 Fed. (2d) 119, was a case almost identical to the case before this Honorable Court and the results thereof are the same as that reached by the court below. The court there said (pp. 120 to 122):

"The good will of casualty and surety companies is, therefore, not so closely tied up to their names as is that of commercial companies or even life insurance corporations, and a similarity is not so important to them. The brokers, agents, and insurance managers who actually decide in what company to place the business are sufficiently familiar with the personnel, location, etc. of the various companies that they could not be misled by mere similarity of names as the general public would be. This is shown by the large

number of insurance companies with very similar names. For instance, there are 15 companies having 'Standard' as the first word of their titles and three having it as the second. There are 77 having 'American' as the first word; 53, having 'National'; 22, 'United States'; 21, 'Federal'; 21, 'Central'; 20, 'Farmers'; 17, 'Fidelity'; 12, 'Lumbermans'; 21, 'Merchants'; 13, 'Employers'; 14, 'Home'; 10, 'Industrial'; 17, 'Bankers'; 24, 'Western'; 12, 'Security'; 16, 'Pacific'; 11, 'Liberty'; 15, 'General'; 9, 'Continental'; 14, Southern'.

* * * * * * *

"The conclusion that must be drawn, therefore, is that the possibility of confusing the general public is by no means the test to be applied, and that the professional insurance men and experts who are in a sense the plaintiff's public, are not likely to be misled merely by the degree of similarity in this case. The plaintiff contends, however, that the word 'Standard' has through fifty years of use become so closely identified with the plaintiff that it has acquired a secondary meaning and would be understood, when used in connection with the casualty or surety business, as referring only to the plaintiff. The plaintiff has advertised extensively, but never to the general public. It has published house organs for its own agency force; has periodically circularized a large mailing list composed of the mailing lists of its own agents and averaging about 240,000 names; has advertised in the trade journals devoted to the casualty and surety business; and has spent $942,000 on all its advertising in the last seven years. In it the plaintiff has re-

ferred to itself as 'The Standard' and the 'Standard Accident Insurance Company'. But as bearing on the question whether the word 'Standard' has become synonymous with the plaintiff's name, it must be borne in mind that those to whom it was addressed were largely the class of brokers, agents, and insurance managers who were not only familiar but dealt with many other insurance companies having it as the first word of their titles. It is true these other companies were, with one exception, not in the casualty and surety line, but they would nevertheless be a great deterrent to the word acquiring a secondary meaning as referring only to the plaintiff. Two of those companies had long antedated the plaintiff in its use.

"Numerous witnesses testified either in open court or by deposition, for either the plaintiff or for the defendant, as to whether the word 'Standard' has become synonymous with the plaintiff's name and whether the similarity would cause confusion. This testimony is about equally cogent on both sides. Furthermore, the plaintiff proved a number of instances of actual confusion, principally involving misdirected or misdelivered mail. In no case did the confusion involve a loss of business to the plaintiff. They were practically all errors of clerical workers who misdirected mail to the plaintiff which should have gone to the defendant, and not errors of insurance men who were confused as to which company they were dealing with. Considering the large amount of mail received by both companies and the numerous transactions in which they participated, I do not find these instances of confusion impres-

sive. Many such would occur even if the names were very dissimilar.

* * * * * * *

"Considering all the facts and circumstances, I have come to the conclusion that the word 'Standard' has not acquired in the plaintiff's line of business the generally recognized secondary meaning which would make it the equivalent of the plaintiff's name; that the names of the two parties are not so similar as to confuse those who in the ordinary course would have occasion to distinguish between them; and that, therefore, there is no unfair competition by the defendant. Undoubtedly, the plaintiff has frequently been designated 'The Standard' when there was no occasion to distinguish it from any other company with that word in its title; and undoubtedly, also, there will be isolated instances of confusion by persons dealing with either of the parties. But I do not believe that the plaintiff is entitled to appropriate to its exclusive use so common and desirable a word as 'Standard' without a much stronger showing than presented in this case."

See, also:

Selchow and Righter v. Western Printing & Lithographing Co. (D.C., E.D., Wis.), 47 Fed. Supp. 322;

Steem Electric Corp. v. Herzfeld (C.C.A. 7 Cir.), 118 Fed. (2d) 122.

The rule of these cases is an essential deduction from the reason for the law of unfair competition and

"secondary meaning". The rule is logical, established and is conclusive of this case.

Appellants rely upon the case of *Aetna Casualty Co. v. Aetna Auto Finance Co.* (C.C.A. 5 Cir.), 123 F. (2d) 582. This case (like the case of *Academy of Motion Picture Arts v. Benson,* 15 Cal. (2d) 685 (104 P. (2d) 650)) was not decided upon the basis of similarity of names. The defendant there was wrongfully and deliberately seeking to mislead the public into thinking that *it was* the plaintiff. This constitutes an unfair trade practice without regard to similarity of names. In the instant case, the good faith of appellee is established.

IV.

CONCLUSION.

It was plaintiff's burden in the trial Court to prove that the words "American Auto" had a secondary meaning; that such secondary meaning identified appellants and appellants only in the minds of the public who heard them; that the corporate name of appellee was so similar that it would be identified, by people who knew appellants, with appellants; that as a result of such confusion appellants would suffer injury or the public would be misled to its detriment.

In spite of the existence of this burden of proof the record established by a great preponderance exactly the contrary. It shows that the public does not know appellants as "American Auto" and that at

least four or five of them each day call appellants under the belief that "American Auto" means American Automobile Association; that the people who do know appellants and deal with them would not be confused by the existence of appellee; and that no damage can result to appellants and no confusion to anyone from the use by appellee of its corporate name.

Appellee submits that the judgment of the trial Court was correct and that it should be affirmed.

Dated, San Francisco, California,
July 17, 1950.

Respectfully submitted,
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APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

I.

The Potential Injury to Appellants Cannot Be Prevented by the Claimed Intervention of "Experts."

We believe that the injustice of the decision (and its underlying fallacy) may be seen in the nature of the arguments required in its support. For that reason we sincerely trust that the opposing brief will be accorded even more than the ordinary careful scrutiny and analysis.

It should be noted that the appellants have nothing to gain by prevailing in this action other than the protection of that which they already have, a good name established by 38 years of ethical practice. They have acted without delay. Immediately upon the announcement of respondent's intention to commence a business which would

result in placarding an unknown number of automobiles upon the public streets with emblems bearing, with the word "Club" appended, the name by which these appellants and no one else are known in the automobile service field, appellants protested. Respondent is in no position to claim and does not claim that it was unaware of appellants' existence. A mere reference to the local Los Angeles telephone directory would have revealed the fact that appellants are listed as American Auto Insurance Company. Respondent had actual knowledge of appellants. [Tr. 244.] The record does not show why respondent is not willing to commence its new business under the name of American Motor Club. The law, as established by a myriad of cases protecting the secondary meaning of established names from unfair competition by newcomers under similar names, is dominated by the thought that a newcomer, who has an infinity of names to choose from, should not be permitted to infringe upon the rights of a senior appropriator by making confusion possible. This Court has stated that this thought runs through the decisions "like a *leit motiv.*" (App. Op. Br. 17.) The respondent's argument may be fairly epitomized by the statements that (1) no appreciable percentage of the public is aware of appellants either by the name American Auto or by any other name, and (2) that the bulk of appellants' policy sales are made through presumably ethical insurance agents and brokers who qualify as experts and who, including respondent, we are asked to assume, would always be jealous to protect appellants' rights. We respectfully submit that these contentions are baseless, that for the first no pretense of support in the authorities can be made, and that the second has only the superficial appearance of support.

The contention that protection will not be afforded unless the petitioner or his product is known to a substantial percentage of the public implies that only the notorious may successfully appeal to equity. We respectfully submit that the producer of a product or a service which appeals to only 500 persons in a single locality is as entitled to protection against unfair competition as is a manufacturer known the country over. No suggestion to the contrary has been found in any adjudicated case and it is doubtful if respondent will subscribe to such a proposition when it is thus baldly stated.

The second contention, that the intervention of "experts" insulates the harm, is not only without authority as an abstract proposition but, when applied to the facts of this case, involves a downright absurdity. In the first place the so-called experts can at most, only intervene between appellants and the public at one point of contact—in the sale of policies. No such intervention can occur in the establishment or protection of appellants' claim policy. As stated in appellants' opening brief, appellants had 23,258 paid claimants in Southern California alone, in the year 1947 alone, and these claimants received the sum of $1,474,340. It is admitted by respondent that it intends to provide a "claim adjustment service." Insurance companies sin and are sinned against but there are insurance companies which are prideful of fair dealing. As appellants' vice president testified: "A claim service of any company is all-important in that respect" referring to the effect upon its business of a company's reputation with claimants and assureds. [Tr. 83.] He also testified that "We have tried to maintain the best possible claims service and that best service that we can render in all our other departments, engineering, underwriting, etc." [Tr.

81-82.] It was stipulated that this answer might be stricken upon an objection by respondent's counsel and a statement of the Court that the size and growth of appellants' business made such proof a "waste of time." [Tr. 82.] No suggestion to the contrary was made by respondent, direct or indirect. One of the admitted proposed activities of respondent is such as to place it beyond appellants' power, to some extent at least, to control its reputation for the settlement of claims. It is inevitable that among the thousands of persons who now and will hereafter know appellants as American Auto there will be some who will attribute to it any treatment received at the hands of respondent, as the American Auto Club, whether neglectful, unfair or otherwise. Let us suppose that the policy of respondent *or of the companies through which it directly or indirectly places insurance* is radically contrary to that of appellants. Is not a proportionate damage to appellants' reputation with some of an unknown number of future claims not only reasonably forseeable but inevitable? But beyond all this the facts of the present case involve extraordinary opportunities for confusion. *Admittedly the respondent intends to placard its members' cars with emblems bearing the words "American Auto Club."* It is natural, foreseeable and inevitable that an unpredictable number of persons, seeing these emblemized vehicles, will assume that their owners belong to a club which, to say the very least, is affiliated with these appellants; that an unpredictable number of persons having claims against such persons will assume that they are dealing directly with these appellants *or with a club affiliated with them* and will attribute to these appellants whatever treatment they receive from respondent. It is apparent that there will be no interven-

tion of so-called experts between appellants and the public at these important points of contact. *Does it not follow that, to some immeasurable extent, appellants' reputation will be placed beyond their control and at the mercy of others?* Furthermore, the "expert" argument is based upon the naive assumption that the intervening experts, including those appealed to by mistake, will in all instances prove to be ethical and disinterested persons who would not capitalize upon another's error to their own profit. The argument assumes that even respondent, receiving telephone calls intended for appellants or mistakenly misdirected mail, will take pains to correct the error. This is an assumption which the appellants cannot make and, we respectfully submit, should not be required to make.

Appellants would like to know upon what basis respondent can argue that these so-called experts, involved only in the sale of policies, can intervene between appellants and those members of the public who, with their own eyes, see respondent's placarded cars upon the streets.

For the reasons stated the facts of this case would distinguish it from those of any decisions, if there were such, holding that the intervention of experts between petitioner and the public would be a basis for the denial of equitable relief, such intervention not being complete.

However, there is no such authority. Commencing on page 16 of its brief respondent sets forth what it contends to be authority for this proposition. It will be found upon reference that the statements relied on are dicta and, in every instance, concerned with very different facts. Respondent quotes first from *Nims on Unfair Competition and Trademarks* (p. 16), in which the author states that

> "Banks, investment houses, insurance companies and similar concerns usually have a clientele so ex-

perienced and discriminating that the probability of confusion is considerably reduced, and the names of such concerns are adequately distinguishable even though they are so similar that if a different type of business were involved, confusion would be inevitable."

As discussed below the only insurance company concerned in any of the three cases cited by the author is a title insurance company in which the facts were *totally* different, no case involving a bank is cited, no case answering the description of "similar concerns" appear, and the remainder of the cases cited (two in number) concern a company selling mortgage bonds in which the courts state there was no possibility of confusion. The only case actually involving a bank which we have found is an old one but reaches a conclusion directly opposite to the text, allowing the injunction. (*Philadelphia Trust, Safe Deposit & Ins. Co. v. Philadelphia Trust Co.,* 123 Fed. 534.) The only appellate court decision we have found involving a casualty insurance company was also decided contrary to the text and is not cited. (*Aetna Casualty Co. v. Aetna Auto Finance Co.,* 123 F. 2d 582. No doubt because cited cases are not in point, respondent does not discuss them at all, stating merely that the author cites them in support of the quoted text (p. 17).

The first of these cases is *Fidelity Bond & Mortgage Co. v. Fidelity Mortgage Co.,* 12 F. 2d 582. In that case the defendant was incorporated and using its name six years before the plaintiff did. Each sold securities but they were of totally different kinds and the court pointed out that there was no chance for confusion. The court said (p. 584):

"There was no possible reason for the appellee mortgage company wanting to pass off its securities for appellants. On the other hand, it was concerned to bring out that they were not, and that by comparing its securities with appellant's." [*sic.*]

Further the court stated (p. 585):

"It is not open, therefore, to claim that there was any liability of confusion on the part even of 'ordinary and unwary' purchasers, much less of purchasers of the character of those who invest in securities, in thinking that they were purchasing appellant's securities, when in fact they were purchasing those of the appellee mortgage company."

Further the court stated (p. 586):

"The features which distinguish them from appellant's securities are so patent that anyone who has sense enough to buy an investment security cannot fail to distinguish between them. There is not the slightest danger of his being misled."

These are the only references in the entire decision which in any way support the text and it is obvious that these comments have no bearing upon the case at bar.

The second decision cited is *Fidelity Bond & Mortgage Co. v. Fidelity Bond & Mortgage Co. of Texas,* 37 F. 2d 99. The opinion of the Circuit Court is very short and reference is made to the opinion of the trial judge in 33 F. 2d 580 for most of the facts. The trial judge pointed out a serious question whether plaintiff, a Missouri concern, had done any business in Texas, where the defendant operated, although bonds had been sold to thirteen people there. He also commented upon the fact that plaintiff, if doing business in Texas, had apparently perhaps been doing it without authority. The trial judge made no

reference to the sophistication of the plaintiff's clientele but the Circuit Court said:

> "People buying mortgage bonds are not apt to rely entirely upon the reputation of the broker offering them, as they would in the case of a manufacturer or dealer offering merchandise. Furthermore, it hardly is possible that both concerns will offer the same issue of bonds at the same time. The possibility of deception of the public or injury to appellant by the similarity of names is very remote."

It is clear that the facts bear no analogy to one in which the newcomer intends to placard with a similar name an unknown number of vehicles upon the public streets.

The third and last decision cited in alleged support of the text is *Lawyers Insurance Co. v. Lawyers Title Insurance Corporation,* 109 F. 2d 35. In that case the plaintiff, *organized,* but not operating under the very similar name, had amalgamated *completely* with two other companies of different names and had become known to the public only as "The District Title Company," "District Title Insurance Co.," "District Title Companies," "District Title Insurance Companies" (none of which were in any way similar) and the court found that the

> "plaintiff is not referred to in business circles as 'The Lawyers Title Insurance Company' and that there is no evidence that plaintiff ever acquired a reputation under that name alone" (p. 37).

Some of the evidence is quoted below. While further comment is superfluous, there were additional completely distinguishing facts and an express recognition of the rule which these appellants seek to invoke for their protection. The defendant had been doing business in Virginia for a number of years before moving to Washington, D. C.,

where plaintiff operated, and upon opening its office in the latter city took steps in the form of its letterheads, the lettering upon its doors, the answering of the telephone and in all possible ways to distinguish itself from the plaintiff even though the plaintiff was not known by any name resembling defendant's. (P. 37.) The rule applicable in the case at bar is expressly recognized. At page 40 the court says:

> "Further, under ordinary circumstances, a corporation acquires rights in its name which are to some extent exclusive. A prior incorporator may enjoin a later one from assuming an identical or confusingly similar name."

Further, at page 43, the court says:

> "Had plaintiff, therefore, built and maintained its good will exclusively or distinctively about its present corporate name, authority would support the existence of the asserted presumptions and entitle it to relief, despite the hardship on defendant and its freedom, subjectively, from deceptive intention. But plaintiff has not done so. For purposes of trade, as distinguished from internal functions, principally distribution of earnings, it has submerged its identity, its good will and the distinctiveness of its corporate name in those of the combination in which, since 1922, it has lived, moved and had its being."

Only after these observations does the court make the comment allegedly supporting the passage from the textbook. It is at page 45, as follows:

> "The probability of confusion is reduced further by the experience and discriminating character of the clientele to which defendant and the plaintiff's combination appeal, and by the care defendant has taken

to add distinguishing matter to its name in publicity and solicitation."

No other authority is cited by the text author.

Next respondent cites *Standard Accident Ins. Co. v. Standard Surety & Casualty Co.,* 53 F. 2d 119. This case is discussed in Respondent's Opening Brief, pages 38-39. This is a decision of a trial judge in the District Court of the Southern District of New York. It was not appealed and there does not appear to have been any ground upon which an appeal could be taken. The only word in common in the two names was the single word "standard." The defendant had been doing business for nine years before the suit was commenced. The judge stated that ninety-five percent of the public does not care with whom they carry casualty insurance and that the other five percent are insurance experts who will not be confused. There was no reference to any other phase of plaintiff's public relations than in the sale of its policies. There was no such potential injury as an intention by the defendant to placard its insured's cars with emblems bearing the plaintiff's nickname with "Club" appended. There was no basic similarity between the two names other than that provided by the use of the single word "standard," one company being "Standard Accident Insurance Company" and the other "Standard Surety & Casualty Company." As stated in *Aetna Casualty & Surety Company v. Aetna Auto Finance,* 123 F. 2d 582, the single word "Aetna" standing alone might not be relieved against but the combination of "Aetna Auto," being a nickname completely suggestive of the plaintiff, would be and was protected.

Respondent cites no additional authorities except the two cases cited by the trial judge, *Selchow, etc. v. Western,*

etc., 47 Fed. Supp. 322, and *Steem Electric Corp. v. Herzfeld,* 118 F. 2d 122. They are not discussed by respondent undoubtedly for the reason that they are not in point. These decisions are discussed in respondent's opening brief, page 34 *et seq.* They hold merely that one who has no exclusive right to the name of a product, and who can have none because the name is either the true name of the article or is generally used, cannot prevent competition unless the product is associated by the public with the producer.

It is noteworthy that these two decisions are classified in Nim's text not on the point respondents seeks to make but where they belong—under "Trademarks." (*Steem Electric v. Herzfeld* under "Descriptive Words and Generic Names," page 546, and under "Use as a Part of a Trade-mark, a Name, or Symbol That Is in the Public Domain," pages 689, 690; *Selchow and Righter v. Western,* under Chapter XIV, "What May Be Appropriated as a Trade-mark," Sec. 208 "Foreign Words," p. 597.) Neither case is cited anywhere else and neither is cited in support of the proposition advanced by respondent and the trial court. Each is cited by the author only in his discussion of *trade-marks* and for the limited purpose stated above.

Cases may be imagined in which the intervention of experts between petitioner and the public might be so complete, and the opportunity to capitalize upon error so limited, that respondent's argument would be well taken. Certainly this is not such a case. Even in the field of sales appellant can have no assurance that telephone calls or mail misdirected to respondent will be redirected. As to respondent's intention of acquiring notoriety through the placarding of its members' cars, respondent's argument is, of course, baseless.

The test is not what would be believed by experts, at least where their intervention is incomplete, but by "the *ordinary unsuspecting person.*" These words are italicized by this Court in *Lane, Bryant, Inc. v. Maternity Lane etc.,* 173 F. 2d 559, 564, quoting from *Academy etc. v. Benson,* 15 Cal. 2d 685.

II.

Respondent Intends to Compete With Appellant.

Respondent now claims that it does not intend to compete with appellants and denies its original sworn admissions that it intends to sell insurance. Please refer to appellants' opening brief (pp. 29-33) for the evidence concerning respondent's true intentions—to sell insurance either directly as originally admitted or indirectly as still admitted.

However, competition between petitioner and defendant is not necessary and its absence does not warrant a denial of relief. (Cases cited, App. Op. Br. pp. 29-30.) In *Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc.,* 123 F. 2d 582, the court said (emphasis added):

> "Neither will it do for defendant to say that its purpose is not to take automobile insurance from plaintiff because it is not in that business but in the business of loaning. *It might not take any automobile insurance away and still not escape the charge of unfair competition.* But as a matter of fact its activities which always couple the giving of insurance with the giving of loans, will necessarily take some business away from plaintiff." (P. 584.)

(It will be noted that the above decision is by the same court that had earlier decided the case of *Fidelity Bond & Mortgage Co. v. Fidelity Bond & Mortgage Co. of*

Texas, 37 F. 2d 99, decided on different facts and being one of the three cases cited by respondent from the Nims text.)

See also, *Academy etc. v. Benson,* 15 Cal. 2d 685, 691-2: ". . . it does not appear necessary that the parties be in competitive business . . ."

III.

In the Field of Insurance the Words "American Auto" Connote These Appellants Exclusively and Respondent, If Permitted to Operate Under That Name, Will Surely Invite Confusion.

Respondent admits (p. 12) that geographic or generic words may obtain a secondary meaning which forms the basis of an action for injunction. It is an undisputed fact that *in the fields of automobile service and insurance* "American Auto" means appellants and no one else. (App. Op. Br. pp. 7-11.) Not only was this admitted by witnesses on both sides, and contradicted by none, but the printed list of insurance companies which are in evidence, state-wide and nation-wide, show that no other person, firm or corporation in any related field is so entitled. (The AAA is referred to hereinafter.) We have been unable to find in respondent's brief any direct denial of this basic fact or any clear implication to the contrary. At pages 8 and 9 of its brief respondent speaks of the intervention of agents and brokers and states that appellants' advertising direct to the public as by newspapers, has not been extensive, except in 1936, and that advertising to the public through brokers stopped in 1944. At pages 12-13 respondent argues that since 1944 appellants have sought to become known as "American Associated" and have done no advertising in connection with automobile insurance or otherwise under the name "Amer-

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ican Auto." Further on page 13 respondent states that appellants have sought to establish that they have become known *"generally"* by the name American Auto, respondent citing page 34 of appellants' opening brief. (Emphasis added.) This is an adroit distortion of appellants' position and involves the basic fallacy implicit in respondent's argument that the public "generally" must be familiar with a petitioner's product or service before it can be protected. The word "generally" is inserted by respondent to provide a vulnerable target. As a reference to that portion of appellants' opening brief cited by respondent will show, instead of attempting as quoted by respondent to show that they were "generally" known as American Auto, appellants stated that the trial court *mistakenly "thought"* that the public, *in general,* must be substantially affected before relief will be granted." (App. Op. Br. p. 34.) Lastly, on this subject, respondent refers to the American Automobile Association and to telephone calls received by appellants intended for the former, contending that "this group of people does *not* identify appellants by the name 'American Auto' for they call appellants in the belief that appellants are someone else." This is another revelation of the core of respondent's argument, that the public in general must know petitioner before relief can be granted, respondent assuming here that the mere existence of persons who do *not* know appellants and who therefore call appellants while attempting to reach someone else is destructive of a secondary meaning! The whole fallacy is epitomized in the conclusion of respondent's brief (pp. 21-22) wherein this illuminating statement is made: "It (the evidence) show that the public does not know appellants as 'American Auto' and that at least four or five of them each day call appellants under the belief that 'American Auto' means American Automobile

Association." (Obviously such evidence was introduced to show that the public is confused by similar names in the same or apparently related fields.) No other comment is to be found in respondent's brief on the basic subject of whether the words "American Auto" have acquired a secondary meaning. Respondent's argument, on this basic point, is merely that (1) no secondary meaning has attached because the public *"in general"* does not know appellants as "American Auto" and (2) that appellants have ceased to use or be interested in that name.

With reference to the first contention it is perfectly true that the public in general does not know appellants as "American Auto" but it is also true that the public "in general" does not know appellants *or any other casualty insurance company* by any name. According to this argument only the notorious could find protection in equity and no casualty company, because of the very nature of its business, could do so. According to this argument all such insurance companies may as well operate under the same name, being designated merely by numbers, because they cannot be "generally" known in any event and, because of the alleged intervention of "experts."

As to the second contention, that appellants have either abandoned, or ceased to use, or ceased to be interested in the name "American Auto," we submit that the evidence uncontradictedly establishes the diametrical opposite. We state respondent's contention alternatively above because there is an evident play on words in respondent's argument. At page 12 respondent states that it does not agree with appellants' statement that the name has not been abandoned but that it is immaterial anyway and that the Court made no finding of an abandonment. Respondent then proceeds with an attmept to develop the point either that appellants have abandoned the name or ceased to be

interested in it. Thus, immediately following the disclaimer, respondent states that the evidence shows

> "that since 1944 appellants have sought to become known as 'American Associated Insurance Companies' and 'American Associated' and have done no advertising in connection with automobile insurance or otherwise under the name American Auto." (Pp. 12-13.)

All of the evidence on this subject was developed from or given by appellants' vice president who also testified that the cessation of advertising was a temporary matter attributable to the fact that automobile liability insurance had become temporarily unprofitable, the witness stating, *"we will undoubtedly try to develop it in the future when the proper time arrives."* [Tr. 153.] There is not the slightest support for the argument of abandonment, by whatever name respondent chooses to call it, nor for that portion of Finding VI, appearing on page 23 of the Transcript. It is true that since the acquisition of the Associated Indemnity Company appellants have wanted the name "American Associated" to be known but it is equally obvious that they also want the name "American Auto" and "American Automobile" to be known. For that reason, and plainly for that reason only, appellants choose the bold black type and the box form of listing in the classified directories as "American Auto" rather than "American Associated." Is it not clear that a company which is a member of a group may wish to preserve its identity as well as to publicize the group? Obviously this is not a case comparable to *Lawyers Insurance Co. v. Lawyers Title Insurance Corporation,* cited by respondent, in which the petitioner had "submerged its identity, its good will and the distinctiveness of its corporate name in those of the combination in which, since 1922, it (had) lived,

moved and had its being." In the very locality in question, Los Angeles, appellants were continually listed in bold black type and in box advertising in the classified directory, before any thought of this proceeding could have been entertained, as "American Auto." All of the telephone directories in evidence, and all references to others, show that everywhere appellants are listed as "American Auto" or "American Automobile" as well as having the group "American Associated," also listed. Is it not inconsistent and anomalous for respondent, proposing to commence operations in Los Angeles as "American Auto Club" to contend that appellants have abandoned the name when a reference to this most primary source of information proves the contrary by revealing an aggressive use of that name?

At page 10 respondent states, concerning telephone directories, that "In each instance appellant's name follows the listing American-Associated Ins. Co." Since telephone directories are uniformly alphabetical it is inevitable that American Auto should follow American Associated.

We respectfully submit that it is obvious and conclusive to the point of making argument to the contrary idle that appellants have never manifested any intention, objectively or subjectively, to submerge their identity in that of the group; instead it is clear that the intention is to have known both the group and appellants individually.

In this connection it is a fair question why appellants should pay for box advertising in classified telephone directories if *all of its contacts* with the public are through the expert class of brokers and agents.

Attention is respectfully directed to appellants' opening brief (pp. 22-28) where the evidence on this subject is considered in detail with supporting references to the transcript and with a citation of authority.

IV.

The American Automobile Association.

The only other person, firm or corporation which it has been possible to find in the United States using either the words "American Auto" or the words "American Automobile" in the automobile service field is the American Automobile Association which is never referred to as "American Auto" but as the AAA or the Triple A, or Three A's. (App. Op. Br. p. 33.) Of this respondent states (p. 14):

> "Although American Automobile Association is a 'motor club,' as is appellee, there is no evidence that appellants, in spite of the identity of names, ever took any action to cause it to change its name."

The foregoing comment is a distortion of the evidence. It was the testimony of all of the witnesses, including one called by respondent, that the American Automobile Association has no direct contact with the public in any manner whatsoever, that it is a parent automobile club whose affiliated members, with which the public has contact, operate under different names, the member club in Southern California being the Automobile Club of Southern California, and that it is never known as "American Auto" or "American Automobile." (For transcript references please see page 33 of appellants' opening brief.) Furthermore, were the facts otherwise so as to provide a basis for respondent's argument, the fact that others infringe upon a petitioner's name is no defense. (*Del Monte etc. v. California Packing Corp.*, 34 F. 2d 774, 777.)

Respondent states (p. 2) that there are sixty-five insurers having the word "American" as the first word in their names, more than fifty having the word "National,"

more than twelve having "United States," more than ten having "Southern" or "Central" or "Western," more than ten having "Associated" or "Farmers" or "General." Appellants' claim is not based upon a contention that the word "American" signifies them. As stated in *Aetna Casualty, etc. v. Aetna Auto Finance,* 123 F. 2d 582, at p. 584, there would be many cases in which the single word "Aetna," standing alone, would not be relieved against whereas the combination of "Aetna Auto," being completely suggestive of the petitioner *even though only a nickname,* would be.

V.

Respondent Cites No Authorities and Does Not Distinguish Those Cited by Appellants.

It is of great significance and not mere oversight that respondent cites no authorities supporting the judgment. Counsel for neither party has found such authority. Cases involving comparably similar names seem uniformly to have been decided in favor of injunction. Respondent only attempts to support the so-called "expert" theory, and that by dicta in inapplicable decisions. The numerous comparable authorities cited by appellants are ignored except for one brief and mistaken comment upon the *Aetna* and *Benson* cases at page 21.

Respondent makes one brief reference to the *Aetna* case, stating that it was not decided upon the similarity of names but on the ground that the defendant was deliberately seeking to misleading the public. But such intent is not necessary: *Lane Bryant, Inc. v. Maternity Lane,* 173 F. 2d 559, 564; *Chemical Co. v. Dobkin,* 68 Fed. Supp. 601, 613 (6); *American Products Co., a Delaware Corporation v. American Products Co., a Michigan*

Corporation, 42 F. 2d 488. See also *dictum* in *Lawyers Title Ins. Co. v. Lawyers, etc.,* 109 F. 2d 35 and *supra*: ". . . despite the hardship on defendant and its freedom, subjectively, from deceptive intention." (p. 43.)

The first of the cited cases is a decision of this Court, in which it is said: "It does not appear that an evil intent is necessary to relief." (P. 564.)

Since respondent cites and attempts to dispose of *Academy v. Benson,* 15 Cal. 2d 685 on the same mistaken premise that a wrongful intent is necessary (Resp. Br. p. 21), attention is called to the contrary comments of this Court on the case (and on this point) following the above quotation.

Respondent makes no other comment upon any of the decisions cited by appellants.

Conclusion.

We respectfully and earnestly submit that if possible confusion is reasonably foreseeable a court of equity should intervene to prevent it *when one of the parties is a newcomer which has not yet commenced operations;* that the rule is and should be one of "safety first," and that prophylaxis is better than a later attempt to cure. It is prayed that the judgment be reversed with directions to grant the injunction.

Respectfully submitted,

PARKER, STANBURY & REESE,
HARRY D. PARKER,
RICHARD E. REESE,
RAYMOND G. STANBURY,
Attorneys for Appellants.

No. 12492

United States
Court of Appeals
for the Ninth Circuit.

STEPHEN W. GERBER,

Appellant.

vs.

JACK E. MOLESWORTH,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the United States District Court for the Northern District of California, Southern Division

No. 28610G

JACK E. MOLESWORTH,

Plaintiff,

vs.

STEPHEN W. GERBER,

Defendant.

COMPLAINT FOR LIBEL

Now Comes plaintiff and for cause of action against defendant, alleges as follows:

I.

Plaintiff is a citizen of the state of Massachusetts, and defendant is a citizen of the state of California, residing in the Northern District of California. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

II.

On October 30, 1948, and for a long period of time prior thereto, plaintiff was, and now is, engaged in the business and occupation of philatelic broker, and stamp dealer at Boston, Massachusetts, and plaintiff enjoyed a good name and reputation as such.

III.

Defendant writes a column entitled "Pets and Peeves" in a weekly magazine known as "Weekly Philatelic Gossip". On or about October 30, 1948, defendant wrote in said column and caused to be published by said magazine, in Vol. 47, Number 9, Whole Number 1408, page 283 thereof, the following words concerning plaintiff:

What's A Mole Worth? Actually nothing, unless you skin it. The mole is a darn nuisance that burrows blindly and aimlessly until trapped. The philatelic species runs true to form as a bore and a nuisance. Sometime ago, he slipped the trap by disclaiming responsibility for substituting No. 460 for No. 478 in a sale. He professes to be a "philatelic broker" who has apparently been carrying on his limited operations at the expense of the large stamp auction houses. Quoting from a few of the reports we learn that, "His returns have always been late and excessive . . . If he doesn't sell them, he returns the stamps." Another report tells us that, "He practically returns about 90% of the lots and they have all taken him off their list. We are doing likewise." Another auction house quotes their experience to the effect that the mole returned $270 from a total of $300, after holding the property between two and three months. He justified the delayed returns with the unreasonable claim that the lots were not as described. From the information furnished to us it seems that he has operated at the auction houses' expense. He'd chisel on the

lots by offering them for sale. If unsuccessful, they would eventually be returned, long after settlement date. This type of operation is a new and clever angle: as long as it can be carried on. But the gravy train is grinding to a stop and it's a painful fact that the mole's worth will have to be tested in a different racket—maybe going to work for a bank or something.

IV.

Said "Weekly Philatelic Gossip" is sold and distributed, throughout the United States, to stamp collectors, stamp auctioneers, and other persons interested in philately.

V.

Said publication was and is false and defamatory. Said publication exposed and now exposes plaintiff to hatred, contempt, ridicule and obloquy, and the same had, and now has, a tendency to injure plaintiff in his said business and occupation of philatelic broker and stamp dealer.

VI.

Said publication was known by defendant to be false at the time he made the same, and he did not have probable or any cause for believing the same to be true. Said publication was made by defendant for the purpose of injuring, disgracing and defaming plaintiff and interfering with his business and occupation of philatelic broker and stamp dealer.

VII.

By reason of the said false and defamatory publication, plaintiff has suffered damages in the sum of One Hundred Thousand Dollars ($100,000.00).

Wherefore, plaintiff prays judgment against defendant: (a) in the sum of One Hundred Thousand Dollars ($100,000.00) general damages; (b) Fifty Thousand Dollars ($50,000.00) exemplary damages; (c) costs of suit; and (d) for such other and further relief as this Court may deem just and proper.

/s/ LEONARD J. BLOOM,
/s/ M. S. HUBERMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed February 4, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT

Comes now the defendant to answer the complaint:

I.

Admits the allegations contained in Paragraph I, III and IV of the Complaint.

II.

Answering Paragraph II of the complaint, the defendant admits that on October 30th, 1948, the plaintiff was engaged in the business of a philatelic

broker in Boston; the defendant denies the remaining averments in said paragraph.

III.

Answering Paragraph V of the complaint, the defendant denies that the publication is false or that it is defamatory; defendant further denies the remaining averments of said paragraph.

IV.

Answering Paragraph VI of the complaint, the defendant specifically denies each and every averment contained in said paragraph.

V.

Answering Paragraph VII of the complaint, the defendant denies that the plaintiff has been damaged in the amount alleged or in any other sum or at all.

As A First, Separate And Distinct Affirmative Defense, the defendant alleges that all statements made of and concerning the plaintiff which are the basis of the claim of the plaintiff are true.

As A Second, Separate and Distinct Affirmative Defense, the defendant alleges:

I.

That the "Weekly Philatelic Gossip" is a magazine which publishes items and discusses matters of common interest to philatelists and those who are engaged in the business of buying and selling

stamps; that defendant has been regularly employed for over two years by said magazine to write articles and a weekly column on such items or matters. That in the course of his employment defendant received unsolicited complaints relating to the improper business activities of the plaintiff; that while the defendant has no personal knowledge of the truth of such statements, said complaints were made by and communicated from sources that the defendant believed at the time and now believes to be reliable, truthful and authentic.

II.

That the defendant published said complaints in the manner set forth in plaintiff's claim as a matter of common interest to philatelists and those persons who are engaged in the business of buying and selling stamps; that at the time of publication and at the present time the defendant believes that said complaints are true; that said publications were not made with malice on the part of the defendant, nor with the intent of injuring the plaintiff.

As A Third, Separate and Distinct Affirmative Defense, the defendant alleges:

I.

The defendant incorporates herein as if set out at length the averments of Pargaraphs I and II of the second separate and distinct affirmative defense.

II.

That the said publication is circulated in the State of California.

III.

That the plaintiff has not at any time demanded a retraction of the alleged defamation complained of.

IV.

That by the terms of section 48a of the Civil Code of the State of California, the complaint fails to state a claim against the defendant upon which relief can be granted.

Wherefore, the defendant prays that the plaintiff take nothing by his complaint and that the defendant be dismissed with his costs.

Dated: April 14th, 1949.

COOPER, WHITE & COOPER,

/s/ GEORGE A. HELMER,
Attorneys for Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed April 14, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT FOR LIBEL

Now Comes plaintiff and as and for a supplement to his complaint for libel in the above action, alleges as follows:

I.

Plaintiff is a citizen of the state of Massachusetts, and defendant is a citizen of the state of California, residing in the Northern District of California. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

II.

On March 5, 1949, and for a long period of time prior thereto, plaintiff was, and now is, engaged in the business and occupation of philatelic broker, and stamp dealer at Boston, Massachusetts, and plaintiff enjoyed a good name and reputation as such.

III.

Defendant writes a column entitled "Pets and Peeves" in a weekly magazine known as "Weekly Philatelic Gossip". On or about March 5, 1949, defendant wrote in said column and caused to be published by said magazine, in Vol. 48, Number 1, Whole Number 1426, page 11 thereof, the following words concerning plaintiff:

Gather Around, Dear Reader and enjoy the funniest story ever told. It furnishes proof positive that reporting stampic shenanigans is a risky voca-

tion; especially, when a few gents are allergic to publicity. Pets and Peeves (October 30, 1948) published an item under the heading, "What's A Mole Worth?" Although no name was mentioned, a part-time Boston dealer named Jack E. Molesworth figured out that the shoe fit. So-o-o, said J. E. M. has filed a libel action against us for a paltry $150,000.00 to assuage his financial hurt as an upright, honest, unimpeachable and expert stamp dealer. (Don't laugh yet.) If selling a counterfeit stamp, if misrepresenting a stamp cataloguing at $40.00 as being one catalogued at $55.00, if unreasonable demands and claims, if allegedly unsatisfactory auction settlements—if IF IF IF all of these are the distinguishing characteristics of an upright, honest, unimpeachable and well-informed stamp dealer, then we apologize. (Laughter, please.) We are reminded of one of several libel suits in recent years. A bozo sued Drew Pearson for libel. When the case was tried, Pearson proved the "libel" and the bozo landed in the klink. When he saw the light, it was filtered through iron bars. We have two pertinent opinions, (1) this J. E. M. is being used as a tool to intimidate us in our fight for decency in philately, (2) this J. E. M. won't dare to bring the case to trial.

IV.

Said "Weekly Philatelic Gossip" is sold and distributed, throughout the United States, to stamp collectors, stamp auctioneers, and other persons interested in philately.

V.

Said publication was and is false and defamatory. Said publication exposed and now exposes plaintiff to hatred, contempt, ridicule and obloquy, and the same had, and now has, a tendency to injure plaintiff in his said business and occupation of philatelic broker and stamp dealer.

VI.

Said publication was known by defendant to be false at the time he made the same, and he did not have probable or any cause for believing the same to be true. Said publication was made by defendant for the purpose of injuring, disgracing and defaming plaintiff and interfering with his business and occupation of philatelic broker and stamp dealer.

VII.

By reason of the said false and defamatory publication, plaintiff has suffered damages in the sum of One Hundred Thousand Dollars ($100,000.00).

Wherefore, plaintiff prays judgment against defendant: (a) in the sum of One Hundred Thousand Dollars ($100,000.00) general damages; (b) Fifty Thousand Dollars ($50,000.00) exemplary damages; (c) costs of suit; and (d) for such other and further relief as this Court may deem just and proper.

/s/ LEONARD J. BLOOM,
/s/ M. S. HUBERMAN,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

STIPULATION AND ORDER PERMITTING FILING OF SUPPLEMENTAL COMPLAINT FOR LIBEL

It is hereby stipulated by and between counsel for plaintiff and counsel for defendant that plaintiff may file the attached Supplemental Complaint for Libel, and that defendant may have ten (10) days from date hereof within which to answer said Supplemental Complaint for Libel.

Dated: June 28, 1949.

/s/ LEONARD J. BLOOM,
/s/ M. S. HUBERMAN,
Counsel for Plaintiff.

/s/ ALEX. L. ARGUELLO,
Counsel for Defendant.

It is hereby ordered that plaintiff may file the attached Supplemental Complaint for Libel in the above-entitled action, and it is further ordered that defendant may have ten (10) days from date hereof within which to answer said Supplemental Complaint for Libel.

Dated: July 5, 1949.

/s/ LOUIS GOODMAN,
United States District Judge.

[Endorsed]: Filed July 5, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT TO SUPPLEMENTAL COMPLAINT FOR LIABILITY

Comes Now the defendant to answer the supplemental complaint:

I.

Admits the allegations contained in Paragraphs I, III, and IV of the Complaint.

II.

Answering Paragraph II of the complaint, the defendant admits that on March 5, 1949, plaintiff was engaged in the business of a philatelic broker in Boston; defendant denies the remaining averments in said paragraph.

III.

Answering Paragraph V of the complaint, defendant denies that the publication is false or that it is defamatory; defendant further denies the remaining averments of said paragraph.

IV.

Answering Paragraph VI of the complaint, defendant specifically denies each and every averment contained in said paragraph.

V.

Answering Paragraph VII of the complaint, defendant denies that plaintiff has been damaged in the amount alleged or in any other sum or at all.

As a First, Separate and Distinct Affirmative Defense, defendant alleges that all statements made of and concerning the plaintiff which are the basis of the claim of the plaintiff are true.

As a Second, Separate and Distinct Affirmative Defense, defendant alleges:

I.

That the "Weekly Philatelic Gossip" is a magazine which publishes items and discusses matters of common interest to philatelists and those who are engaged in the business of buying and selling stamps; that defendant has been regularly employed for over two years by said magazine to write articles and a weekly column on such items or matters. That in the course of his employment, defendant received unsolicited complaints relating to the improper business activities of the plaintiff; that while the defendant has no personal knowledge of the truth of such statements, said complaints were made by and communicated from sources that the defendant believed at the time and now believes to be reliable, truthful and authentic.

II.

That the defendant published said complaints in the manner set forth in plaintiff's claim as a matter of common interest to philatelists and those persons who are engaged in the business of buying and selling stamps; that at the time of publication and at the present time defendant believes that said com-

plaints are true; that said publications were not made with malice on the part of defendant, nor with the intent of injuring the plaintiff.

III.

That plaintiff has not at any time demanded a retraction of the alleged defamation complained of.

IV.

That by the terms of section 48a of the Civil Code of the State of California, the complaint fails to state a claim against the defendant upon which relief can be granted.

Wherefore, defendant prays that plaintiff take nothing by his complaint and that defendant be dismissed with his costs.

Dated: This .... day of ....., 1949.

ARGUELLO and GIOMETTI,
Attorneys for Defendant.

State of California,
City and County of San Francisco—ss.

Stephen W. Gerber, being first duly sworn, deposes and says:

That he is the defendant in the above entitled action; that he has read the foregoing answer to supplemental complaint for liability and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief and as to those matters he believes it to be true.

/s/ STEPHEN W. GERBER.

Subscribed and sworn to before me this 18th day of July, 1949.

[Seal] /s/ ALICE E. LOWRIE,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed July 26, 1949.

[Title of District Court and Cause.]

NOTICE OF INTENTION TO INTRODUCE EVIDENCE OF SUBSEQUENT LIBELS

To defendant Stephen W. Gerber and to Arguello and Giometti, his attorneys:

Please take notice that at the trial of the above-entitled action, on September 1, 1949, plaintiff intends to introduce evidence in said action of libels of the defendant of and concerning plaintiff subsequent to the libels set forth in the complaint and supplemental complaint on file herein, to wit:

(1) That certain libel contained in a letter from defendant to one Larry Borenstein, dated February 20, 1949;

(2) That certain libel contained in the July 2, 1949, issue of "Weekly Philatelic Gossip" at page 555 thereof.

Dated: August 17, 1949.

/s/ LEONARD J. BLOOM,
/s/ M. S. HUBERMAN,
Attorneys for Plaintiff.

Receipt of Copy Acknowledged.

[Endorsed]: Filed August 18, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the first day of September, 1949, before the Court sitting without a jury, Joseph B. Abrams, Esq., M. S. Huberman, Esq., and Leonard J. Bloom, Esq., appearing as attorneys for plaintiff, and Alex Arguello, Esq., and Marvin Giometti, Esq., appearing as attorneys for defendant. Evidence both oral and documentary having been introduced, and the cause submitted for decision, this Court finds the facts and states the conclusion of law as follows:

Findings of Fact

I.

Plaintiff Jack E. Molesworth is a citizen of the State of Massachusetts, and defendant is a citizen of the State of California, residing in the Northern District of California. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

II.

On October 30, 1948, and on March 5, 1949, and for a long period of time prior to October 30, 1948, plaintiff Jack E. Molesworth was, and now is, engaged in the business and occupation of philatelic broker and stamp dealer at Boston, Massachusetts, and at all times herein mentioned, said plaintiff enjoyed a good name and reputation as such.

III.

Defendant Stephen W. Gerber on said dates and for a long period of time prior thereto wrote a column entitled "Pets & Peeves" in a weekly magazine known as "Weekly Philatelic Gossip". On or about October 30, 1948, defendant Stephen W. Gerber wrote in said column and caused to be published by said magazine, in Vol. 47, No. 9, Whole Number 1408, page 283 thereof, the following words of and concerning plaintiff Jack E. Molesworth:

"What's A Mole Worth? Actually nothing, unless you skin it. The mole is a darn nuisance that burrows blindly and aimlessly until trapped. The philatelic species runs true to form as a bore and a nuisance. Sometime ago, he slipped the trap by disclaiming responsibility for substituting No. 460 for No. 478 in a sale. He professes to be a "Philatelic broker" who has apparently been carrying on his limited operations at the expense of the large stamp auction houses. Quoting from a few of the reports we learn that, "His returns have always been late and excessive . . . If he doesn't sell them, he returns the stamps." Another report tells us that, "He practically returns about 90% of the lots and they have all taken him off their list. We are doing likewise." Another auction house quotes their experience to the effect that the mole returned $270 from a total of $300, after holding the property between two and three months. He justified the delayed returns with the unreasonable claim that the lots were not as described. From the informa-

tion furnished to us it seems that he has operated at the auction houses' expense. He'd chisel on the lots by offering them for sale. If unsuccessful, they would eventually be returned, long after settlement date. This type of operation is a new and clever angle: as long as it can be carried on. But the gravy train is grinding to a stop and it's a painful fact that the mole's worth will have to be tested in a different racket—maybe going to work for a bank or something.

IV.

On or about March 5, 1949, defendant Stephen W. Gerber wrote in said column and caused to be published by said magazine in Vol. 48, Number 1, Whole Number 1426, page 11 thereof, the following words of an concerning plaintiff Jack E. Molesworth:

Gather Around, Dear Reader and enjoy the funniest story ever told. It furnishes proof positive that reporting stampic shenanigans is a risky vocation; especially, when a few gents are allergic to publicity. Pets and Peeves (October 30, 1948) published an item under the heading, "What's A Mole Worth?" Although no name was mentioned, a part-time Boston dealer named Jack E. Molesworth figured out that the shoe fit. So-o-o, said J. E. M. has filed a libel action against us for a paltry $150,000.00 to assuage his financial hurt as an upright, honest, unimpeachable and expert stamp dealer. (Don't laugh yet.) If selling a counterfeit stamp, if misrepresenting a stamp cataloguing at $40.00 as

being one catalogued at $55.00, if unreasonable demands and claims, if allegedly unsatisfactory auction settlements—if IF IF IF all of these are the distinguishing characteristics of an upright, honest, unimpeachable and well-informed stamp dealer, then we apologize. (Laughter, please.) We are reminded of one of several libel suits in recent years. A bozo sued Drew Pearson for libel. When the case was tried, Pearson proved the "libel" and the bozo landed in the klink. When he saw the light, it was filtered through iron bars. We have two pertinent opinions, (1) this J. E. M. is being used as a tool to intimidate us in our fight for decency in philately, (2) this J. E. M. won't dare to bring the case to trial.

V.

Said "Weekly Philatelic Gossip" is a national stamp magazine published weekly at Holton, Kansas. Said magazine is sold and distributed throughout the United States, to stamp collectors, stamp auctioneers, and other persons interested in philately.

VI.

Said publications, and each of them, were and are false and defamatory. Said publications, and each of them, exposed, and now expose, plaintiff Jack E. Molesworth to hatred, contempt, ridicule and obloquy, and said publications, and each of them, had, and have a tendency to injure plaintiff in his business and occupation of philatelic broker and stamp dealer.

VII.

Said publications, and each of them, caused plaintiff Jack E. Molesworth, great mental anguish and suffering, and said publications, and each of them, injured plaintiff in his said business and occupation of philatelic broker and stamp dealer.

VIII.

Said publications, and each of them, were known by defendant Stephen W. Gerber to be false at the time he made the same, and said defendant did not have probable or any cause for believing the same to be true. Said publications and each of them were made by defendant Stephen W. Gerber maliciously and for the purpose of injuring, disgracing and defaming plaintiff Jack E. Molesworth and interfering with his business and occupation of philatelic broker and stamp dealer.

IX.

Said publications, and each of them, were made by defendant Stephen W. Gerber because of a private controversy or business dispute with plaintiff Jack E. Molesworth. Subsequent to said publication of October 30, 1948, and prior to said publication of March 5, 1949, plaintiff Jack E. Molesworth asked defendant Stephen W. Gerber for the opportunity to demonstrate to him the falsity of said publication of October 30, 1948, but defendant Stephen W. Gerber refused to give plaintiff the opportunity to do so, but on the contrary wrote and caused to be published said publication of March

5, 1949. On November 8, 1948, plaintiff Jack E. Molesworth demanded a retraction of said publication of October 30, 1948, from defendant Stephen W. Gerber, but said defendant refused to retract the same. At all times herein mentioned, defendant Stephen W. Gerber has asserted that said publications, and each of them, were true and correct, whereas said defendant knew the same to be false and untrue. At no time herein mentioned did defendant Stephen W. Gerber make due or proper investigation of the truth or falsity of the statements made in said publications.

X.

Said publication of October 30, 1948, and said publication of March 5, 1949, and each of them, are libelous per se.

XI.

The Court finds that plaintiff Jack E. Molesworth has sustained general damages in the sum of Three Thousand Dollars ($3,000.00) on account of said publications, and that punitive damages in the sum of Seven Thousand Five Hundred Dollars ($7,500.00) should be assessed against defendant Stephen W. Gerber.

Conclusions of Law

1. That this Court has jurisdiction of this cause;

2. That plaintiff Jack E. Molesworth recover against defendant Stephen W. Gerber general dam-

ages in the sum of Three Thousand Dollars ($3,000.00);

3. That plaintiff Jack E. Molesworth recover against defendant Stephen W. Gerber punitive damages in the sum of Seven Thousand Five Hundred Dollars ($7,500.00);

4. That Plaintiff Jack E. Molesworth recover against defendant Stephen W. Gerber his costs incurred herein.

Judgment is hereby ordered to be entered accordingly.

Dated this 22nd day of November, 1949.

/s/ LOUIS GOODMAN,
United States District Judge.

Receipt of Copy Acknowledged.

Lodged November 12, 1949.

[Endorsed]: Filed November 23, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 28610G

JACK E. MOLESWORTH,

Plaintiff,

vs.

STEPHEN W. GERBER,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 1st day of September, 1949, before this Court sitting without a jury, Joseph B. Abrams, Esq., M. S. Huberman, Esq., and Leonard J. Bloom, Esq., appearing as attorneys for plaintiff, and Alex Arguello, Esq., and Marvin Giometti, Esq., appearing as attorneys for defendant. Evidence both oral and documentary was introduced and the cause submitted for decision, and this Court being fully advised in the premises, made its Findings of Fact and Conclusions of Law.

It Is Therefore Ordered, Adjudged And Decreed as follows:

(1) That plaintiff Jack E. Molesworth do have and recover of and from defendant Stephen W. Gerber general damages in the sum of Three Thousand dollars ($3,000.00);

(2) That plaintiff Jack E. Molesworth do have and recover of and from defendant Stephen W.

Gerber punitive damages in the sum of Seventy-five Hundred Dollars ($7500.00);

(3) That plaintiff Jack E. Molesworth recover from defendant Stephen W. Gerber his costs incurred or expended herein in the sum of $.....

Dated: December 2nd, 1949.

/s/ LOUIS GOODMAN,
United States District Judge.

Approved as to form, as provided in Rule 5 (d).
/s/ LEONARD J. BLOOM,
/s/ M. S. HUBERMAN,
Attorneys for Plaintiff
Jack E. Molesworth.

Approved as to form, as provided in Rule 5 (d).
ARGUELLO & GIOMETTI,
Attorneys for Defendant
Stephen W. Gerber.

Entered in Civil Docket Dec. 2, 1949.

Receipt of Copy Acknowledged.

[Endorsed]: Filed December 2, 1949.

In the Southern Division of the United States District Court for the Northern District of California

No. 28,610-G

JACK E. MOLESWORTH,

Plaintiff,

vs.

STEPHEN W. GERBER,

Defendant.

Before: Hon. Louis E. Goodman,
Judge.

REPORTER'S TRANSCRIPT

Thursday, September 1, 1949

Appearances:

For the Plaintiff:
LEONARD J. BLOOM, ESQ.
JOSEPH ABRAMS, ESQ.
JEROME SACK, ESQ.

For the Defendant:
ALEX ARGUELLO, ESQ.
MARVIN GIOMETTI, ESQ.

* * *

In paragraph 4, if Your Honor please, of this original complaint, we set forth that this Weekly Philatelic Gossip is sold and distributed throughout the United States to stamp dealers, stamp collectors, auctioneers, and other persons interested in phi-

lately. That paragraph is admitted, if Your Honor please, in the answers which have been filed, so we have here an admission that the magazine is circulated everywhere in the United States and that it is directed and distributed primarily to people engaged in or interested in the stamp business. [3*]

* * *

JOSEPH B. ABRAMS

called as a witness on behalf of the plaintiff; sworn.

The Clerk: State your name, please.

A. Joseph B. Abrams.

Direct Examination

* * *

By Mr. Bloom:

Q. Will you give us your educational background and experience in the stamp business?

A. Well, as I say, I graduated from Harvard College and Harvard Law School. I have been special counsel for the Commonwealth of Massachusetts under three bank commissioners. As far as my stamp collecting activities are concerned, I have been a collector since I was a boy. I have been a serious collector for about a dozen years, and by serious collector of stamps, it means one who collects the more valuable stamps and is a substantial collector.

I am personally familiar with all the airmail dealers in the United States. There are only a few

*** Page numbering appearing at top of page of original Reporter's Transcript.**

(Testimony of Joseph B. Abrams.)

of them who specialize in airmail, and I have a practically complete collection of airmail of the world except for the newer rarities. I am a collector of United States stamps, and I have perhaps 50 or 60 albums of stamps in covers in my collection. I know the Boston dealers and some of the collectors. I know the New York dealers and auction houses and I have been a purchaser in auctions and from dealers and from other collectors, as I say, seriously for at least a dozen years. [14]

* * *

Q. (By Mr. Bloom): Will you tell us how the stamp business is conducted?

A. Eliminating what I don't consider of any consequence in the stamp business, such as selling and buying stamps as they come out—in philately we call it "postoffice"—and confining myself to the serious business of stamp collecting, I would state that the stamp business in the United States is concentrated in the hands of relatively few dealers and auction houses. There are relatively few collectors, out of the 140,000,000 people in the United States, substantial collectors, that is, collectors that run into the thousands. The ordinary method of selling stamps——

* * *

Q. (By Mr. Bloom): Now, Mr. Abrams, will you briefly tell us the manner in which the stamp business is conducted?

A. The ordinary method of selling stamps in-

(Testimony of Joseph B. Abrams.)

volving the rich and valuable collections is by auction sale. These auctions are held, for the most part, in New York City. The business is [16] concentrated in the hands of perhaps a dozen large auction houses in New York City. There are two or three auction houses in Boston. There are scattered auctions held throughout the country. There is one house in Philadelphia that runs auctions. The large and valuable collections, like the Roosevelt and Ickes collections, were sold by auction houses, out of an auction house in New York City. They call a sale of issues. A catalogue is prepared wherein each stamp is given a number out of the official stamp catalogue, which is known as a Scott's Catalogue.

Every stamp—and I am limiting myself to the United States stamps—every stamp is given a number. No. 1 would be the five cent of 1847. No. 2 would be the ten cent of 1847. Those were the first stamps made in the United States for postage purposes. So on down the line by year, numbers added from year to year, and they pile up, probably 23 new issues, or thirty new ones added, so that at the present time we have altogether 950 or so stamp collections of legal postage.

These large auction houses sell by sending perhaps 1500 catalogues to 1500 serious collectors in the United States. Sale is by description in a catalogue. Ordinarily, the purchaser or bidder does not see the stamp, unless photographs of the more rare ones are with the catalogue. The method of description

(Testimony of Joseph B. Abrams.)

starts with "Superb," "Very fine," "Fine," "Very good," "Good." Some houses selling stamps call them "Average." [17]

The collector, wherever he may be in the United States, who gets a catalogue, sends a mail bid if he doesn't attend the auction, if he doesn't bid from the floor, he sends in a mail bid, and if his bid is the highest bid at that particular sale, he is awarded the stamp and it is sent to him. That is the way the auction business is conducted, and the most important thing in the entire stamp industry is the integrity of the auction house or dealer selling, so far as his description of the stamps is concerned, confidence in the auction house, because once the collector loses confidence in the integrity of the dealer, the dealer is lost, because everything is based on the integrity and honesty of the dealer in the business.

Another aspect of how stamps are sold and dealt in, you have stores. You might find a half a dozen stamp stores here in San Francisco, dealers selling stamps over the counter. People who are interested in collecting stamps, they can either buy from collectors or they themselves buy at auctions, so that the collectors are always bidding against the dealers themselves in the auction sales. And, again, integrity is the cornerstone of the entire stamp business. If a man comes in you didn't know, a dealer in San Francisco—I am only supposing—says, "I want to sell a 90 cent No 122, or an imperfect stamp," I have confidence in that dealer before I give him

(Testimony of Joseph B. Abrams.)

a hundred dollars for a number 122, because that is about the average price for that particular stamp. So I have a picture of the stamp in my [18] pocket, the catalogue showing $1,000. That stamp may or may not be genuine, and I bought it because I have confidence in the person who sold it to me. I put it in the stamp catalogue for $100 because I had confidence in him. I would not have bought that stamp from him if he did not have my confidence.

In general, finishing up this aspect of the case, all I can say is that the stamp business is concentrated in the hands of a relatively few people, and the slightest breath of suspicion will affect any dealer and is enough to ruin him in the eyes of the few serious collectors in the stamp field.

Q. What, if anything, has integrity to do with the purchase of stamps by a dealer or broker who is seeking stamps from others?

A. All I can say in answer to that, Mr. Bloom, is that it is like your San Francisco Bar Association. The lawyers get talking about a certain lawyer, something he did wrong, it is very bad for that lawyer. In the stamp business, if the dealers get talking about a dealer amongst themselves, those dealers won't do business with him. They will remove him from auctions. They won't accept his bids. If a dealer in the business gets a reputation of anything suspicious about him, he sends in bids and the auction houses disregard them, won't even write him a letter saying why his bids are never

(Testimony of Joseph B. Abrams.)

filled, because that dealer does not know and they don't explain that, just simply disregard him.

Q. You are familiar with the two articles which are the subject [19] matter of this action?

A. Yes, sir.

Q. In your dealings in the stamp fraternity, since the publication of those articles, have those articles been the subject matter of discussion in the fraternity? A. They have.

Q. Where have you discussed, or where have these articles been called to your attention, if any place?

A. At dealers' offices in Boston, and at the stamp convention that was held in Boston about three weeks ago.

Q. What type or branch of the business, members belonging to what branch?

A. Both collectors and dealers have discussed the Molesworth articles, as well as this case. They have created a great deal of comment and talk in the field. In fact, it has almost become a "cause celebre," if you will pardon the French, Your Honor. [20]

* * *

JACK E. MOLESWORTH

the plaintiff herein; sworn.

The Clerk: State your name to the Court, please.

A. My name is Jack E. Molesworth.

Direct Examination

By Mr. Bloom:

Q. Mr. Molesworth, where do you reside?

A. Boston, Massachusettes.

Q. Where were you educated?

A. I was educated at Park College, Parksville, Missouri; Tulane University, New Orleans, from which I received a Bachelor degree in Business Administration; subsequent to that graduated the school of business at Harvard where I received a master's degree in Business Administration cum laude.

Q. During part of the time you were a member, were you, of the armed forces?

A. Yes, I was. In fact, the education was coincident with the portion of the time that I was in the navy. I enrolled in the navy in July, 1943, was discharged from the navy September 3, 1946.

Q. How long have you been engaged in the stamp business in any capacity?

A. I would say since I ran my first ad in a magazine of national distribution in 1939.

Q. How old were you at that time?

A. I was 14 years old at that time. [27]

Q. How long have you been engaged in the—how long were you engaged in the business as a dealer? A. Ten years.

(Testimony of Jack E. Molesworth.)

Q. How old are you now? A. 23 years old.

Q. During the time you were in school in Tulane University, were you engaged in the stamp business?

A. Yes, after I was discharged from the navy, I lived at Tulane University under a GI bill, which furnished $65 a month, and at the same time I ran a stamp business to make up the difference in expenses from what the GI bill furnished and what was necessary for my expenses. That difference was approximately $100 a month, which was furnished by the stamp business.

Q. Then you went to Harvard, is that correct?

A. Yes.

Q. You continued in the stamp business while you were studying at Harvard, is that correct?

A. Yes, I did. It also made up the difference in expenses at Harvard for 16 months.

Q. After you got out of Harvard, as I understand it, you continued in the business as a stamp dealer, is that correct? A. Yes, I have.

Q. You have continued in it up to the present time? A. That is correct.

Q. When you got out of Harvard University, you also engaged in [28] another occupation?

A. At the time I graduated from Harvard, I accepted a position with a Boston bank as manager of their credit department. The stamp business has been a part time enterprise, although actually the amount of time I have spent is roughly 30 hours a week as opposed to 40 hours a week in my main business.

(Testimony of Jack E. Molesworth.)

Q. Have you intended to make this your full time business?

A. It has been my intention for some years to eventually enter the stamp business on a full time basis once I have acquired sufficient capital to do it in the manner in which I desire to do it.

Q. As a matter of fact, you were a recipient of a government loan to help you to go into the stamp business, isn't that right?

A. That is correct; after I was dscharged from the navy in September, 1946, I secured a $2,000 GI loan from the Mercantile Bank & Trust Company of Kansas City, Missouri.

Q. Is there a balance due on that loan?

A. Balance of $1,000 still due on that loan.

Q. During the year 1946—let's go back that far—what would you say the volume of your sales of stamps was in that year?

A. In excess of $5,000 in 1946.

Q. What has it been by year since then?

A. In 1947 the volume of operation was in excess of $15,000. In 1948 the volume of operation was in excess of $20,000. And in 1949, to and including July of this year, the volume was [29] approximately $11,000.

Q. Is it a general statement that the volume of business you have transacted in 1949 up to date is substantially the same or is it less in voulme than in 1948? A. It is slightly less in volume.

Q. And with the exception of that experience

(Testimony of Jack E. Molesworth.)

with this year, has your business been increasing or decreasing, an increasing or decreasing business?

A. My business was a rapidly expanding business prior to the publication of this article, no question.

Mr. Arguello: I ask that that go out as not responsive.

Mr. Bloom: Why not?

The Court: You said prior to this year, prior to 1949?

Mr. Bloom: Prior to 1949.

The Court: What is your answer to that? Yes?

A. Will you repeat it?

The Court: He wants to know if your business was a steadily expanding business prior to 1949.

A. Yes, it was.

Q. (By Mr. Bloom): Your businesss was expanding? Let's put it this way: Your business was expanding up to the date of the publication of this first article, which was in the latter part of October, or October 30th of 1948, is that correct?

A. That is true.

The Court: Do you have a place of business?

A. My business is entirely by mail. I deal from my residence.

Q. You deal from your home?

A. Which is quite customary in the stamp business in a number of cases.

Q. (By Mr. Bloom): In 1947 you were engaged in advertising and selling stamps to various dealers

(Testimony of Jack E. Molesworth.)

and collectors throughout the country, were you not?

A. Yes, I was.

Q. In that year you did some business with Mr. Gerber, the defendant in this action, isn't that right?

A. That is correct.

Q. Here is a letter dated October 31st, 1947, on stationery of the National Stamp Company, 1105 Russ Building, San Francisco, purporting to be signed by Stephen W. Gerber, and I will ask you if you received that letter on or about the date it bears. A. Yes, I did.

Q. This letter states:

> "Dear Mr. Molesworth:
>
> I will sincerely appreciate having you send to me the very fine set of 397-400; the 463b block and the single of 478. Immediately upon receipt and examination, a check will go forward in payment. Cordially yours, National Stamp Company, Stephen W. Gerber."

Is that the first stamp transaction you ever had with Mr. Gerber?

A. That is the first transaction, yes. [31]

Mr. Bloom: I now offer in evidence as Plaintiff's Exhibit first in order this letter.

> (Thereupon letter of October 31, 1947, Gerber to Molesworth, was received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Bloom): By the way, showing you this article written by Mr. Gerber in the October 30,

(Testimony of Jack E. Molesworth.)

1949, issue of Weekly Philatelic Gossip, where it refers to "some time ago he slipped the trap by disclaiming responsibility for substituting No. 460 for No. 478 in a sale."

I would like to ask you if that No. 478 referred to in this article is the same No. 478 as is referred to in the letter we have just introduced.

A. It is the same.

Mr. Arguello: I would suggest, before the answer is given, that the whole article be put in evidence.

Mr. Bloom: Let me do it my way.

Mr. Arguello: Rather than just putting in part of the article.

Mr. Bloom: We will get to the article momentarily. I want to identify that reference, is all.

Q. And showing you a letter dated November 13, 1947, from Mr. Gerber, I will ask you if you received that as part of this transaction on or about the date it bears. A. Yes, I did. [32]

Mr. Bloom: This letter, Your Honor, says:

> "We return the stamp herewith which you specify as No. 478. We are inclined to think that this is classified improperly and that it is actually No. 460.
>
> Cordially yours, National Stamp Company, Stephen W. Gerber."

I offer this in evidence as Plaintiff's Exhibit next in order.

(Testimony of Jack E. Molesworth.)

(Thereupon letter of November 13, 1947, Gerber to Molesworth, was thereupon received in evidence and marked Plaintiff's Exhibit No. 2.)

Q. (By Mr. Bloom): So as of that date, I take it, your relations with the defendant were cordial?

A. Yes.

Q. As expressed in these letters, is that correct?

A. Yes.

Q. You had no argument or trouble with Mr. Gerber? A. None whatsoever.

Q. Now, I show you what purports to be a circular dated may 17, 1948, which emanated from the National Stamp Company, Menlo Park, California, and I will ask you if you received on or about that date this circular from Mr. Gerber and his company.

A. Yes, I did. This is an auction catalogue of Mr. Gerber's National Stamp Company.

Mr. Bloom: I now offer this in evidence as Plaintiff's next in order, and call your attention to the fact that this circular says that, "These lots are offered for our own account [33] from probably the world's largest stock of United States Mint stamps." The words "the world's largest stock of United States Mint stamps" are underlined and in capitals.

* * *

Q. (By Mr. Bloom): Now, in response to that circular, did you tender some bids for stamps to Mr. Gerber?

A. Yes, I mailed him quite a number of bids in response to that [34] catalogue.

(Testimony of Jack E. Molesworth.)

Q. Were you the successful bidder?

A. I was the successful bidder on six of the lots upon which I bid.

Q. I show you a letter dated May 31st, 1948, signed Stephen W. Gerber, and ask you if you received that as part of the transaction we are now talking about.

A. Yes, this is his reply to my letter returning three of the lots since the lots were not in accordance with the description in the catalogue and, to my mind, had been misrepresented.

Mr. Bloom: This letter, if Your Honor please, states:

> "Dear Mr. Molesworth:
>
> I do not know whether your note of May 25th was intended to be facetious or if you are serious. The terms of our sale were clearly set forth and we have reason to believe that they are the most liberal terms ever employed in any auction."

It ends,

> "If your note was intended to be serious, please confirm this so that we may take your name off our list and not subject you to the terrible injustice of bidding our sales." [35]

Q. (By Mr. Bloom): Referring to the taking of the deposition two days ago of Mr. Gerber, Mr. Gerber stated he received what he called a "nasty letter"—"very nasty letter" from Mr. Molesworth in reference to this transaction. You stated you

(Testimony of Jack E. Molesworth.)

would produce the letter at this time. Have you that letter?

Mr. Arguello: Yes, we have it, Your Honor. I will ask that you call the Court's attention to the date, Mr. Bloom, if you intend to introduce it.

Mr. Bloom: All right. This is the letter you called a "very nasty letter," Mr. Gerber?

Mr. Gerber: I considered it so.

Mr. Bloom: (Handing document to witness):

A. Yes, this is the letter I wrote.

Q. (By Mr. Bloom): This is your letter and you mailed that to Mr. Gerber? A. Yes.

Q. In reference to mis-descriptions which you believed he made? A. That is correct. [36]

* * *

The Court: Was there some article in this magazine at a prior time about this plaintiff?

A. The reference in there is to the 478; in other words, at that time I sent an apology to Mr. Gerber for what was an honest mistake, told him that the stamp had been bought as No. 478, the number as which I sold it. The auction was public. W. T. Politz—in my first reference I didn't make reference to his auction house. I said at a public auction. He replied I should not be holding back names, be specific, because he would like to make reference to it in his column. I sent him the name of the auction house, which was W. T. Politz & Bros. and subsequently [37] he made some reference in his column to the mistake of the auction house and some

(Testimony of Jack E. Molesworth.)

mention about a philatelic broker, which was myself. The reference, I don't think it was particularly derogatory.

The Court: Well, you have answered it.

Q. (By Mr. Bloom): I show you a letter from Mr. Gerber dated July 28, 1948. Do you identify that letter? A. Yes, I received this letter.

Mr. Bloom: This letter, Your Honor, is in connection with the same transaction.

The Court: What is the date?

Mr. Bloom: July 28, 1948.

> "Dear Mr. Molesworth:
>
> Your letter of July 22nd is an astonishing piece of effrontery. I do not want to do any business with you and will tell you the reasons because I still want to consider myself a gentleman,"

then there is some talk about the navy and so forth, and in, apparently, the defendant's handwriting, after talking about his sons being in the service, he puts this:

> "And they wear uniforms only on duty. Through very perfunctory inquiries, I am willing to stake anything in the world on my reputation against yours. When I say things about someone, I never express just opinions—I have the facts. When you impugn my integrity, honesty or motives [38] without proof, you can

(Testimony of Jack E. Molesworth.)

judge for yourself what type of character that makes you.

Sincerely yours, Stephen W. Gerber."

I offer this as Plaintiff's exhibit next in order.

(Letter of July 28, 1948, Gerber to Molesworth, was thereupon received in evidence and marked Plaintiff's Exhibit No. 6.)

Q. (By Mr. Bloom): Now, it was following this controversy, was it, that the first article which is the subject of this action was published in the Weekly Philatelic Gossip, is that correct?

A. That is correct.

* * *

Mr. Bloom: If Your Honor please, I offer in evidence as Plaintiff's exhibit this publication, particularly referring to page 283 where this article appears.

(Thereupon Weekly Philatelic Gossip, October 30, 1948, issue, was received in evidence and marked Plaintiff's Exhibit No. 7.)

Q. (By Mr. Bloom): Now, Mr. Molesworth, you read this article, did you, at the time or shortly after it first appeared, that is, [39] October 30th, 1948.

A. Yes. I am a subscriber to the Weekly Philatelic Gossip. When I read that column——

* * *

(Testimony of Jack E. Molesworth.)

Q. (By Mr. Bloom): Tell us what effect the reading of the article had upon you.

A. The full impact of it was terrific upon me. In fact, I was terribly upset, especially by the fact that the statements were completely untrue and had no foundation. Going further, I knew that this would have a drastic effect on my business, not only buying, but also selling stamps, especially the buying and selling of stamps through auctions, buy but can not sell——

Q. (By Mr. Bloom): To sum up, what was your state of mind after you read this article there? [41]

A. It made me highly nervous and also practically made me sick at the thought of what my parents would think, especially my mother, when she saw the article. She, my mother, is in very poor health, a very nervous person, and the shock of the article could be sufficient to kill her under proper circumstances.

* * *

Q. (By Mr. Bloom): In connection with this stamp No. 475, you have testified that that refers to a prior transaction mentioned in one of Mr. Gerber's letters, is that correct? [42] A. Yes.

Q. That occured sometime before, is that right?

A. Yes. [43]

* * *

Q. (By Mr. Bloom): Now, at the close of the last session, Mr. Molesworth, you were testifying as

(Testimony of Jack E. Molesworth.)

to the effect of this first article in the Weekly Philatelic Gossip upon you. Were you finished with your answer? A. No, I was not.

Q. Will you finish, please?

A. To this time since the publication of this libel, I have been subjected to considerable ridicule and chiding and kidding by dealers around the country. I would enter an office and it would be "How's the mole today?" "What's the mole worth?" References of that nature which naturally caused me bad feeling and mental tension.

Q. What effect, if any, has this publication had on your stamp business? [46]

A. In the two months prior to the publication of this libel, my auction purchases amounted to $3200. After the publication of this libel, the last eight months, the total auction purchases were only $6,000. I bid in approximately the same number of sales, same number of bids, approximately, and the same percentage of retail. I believe some of my bids were not recorded by virtue of that libel, and therefore I wasn't able to purchase the number of stamps I would have been able to purchase ordinarily. If I couldn't buy, I couldn't sell.

Q. What type of clientele do you sell your stamps to?

A. I sell my stamps to a high class, selective clientele, people who buy stamps for $5.00 to $1,000 each, leading doctors, lawyers, other business men in the United States.

(Testimony of Jack E. Molesworth.)

Q. It is a fact that in general, then, that clientele of that type would only purchase stamps of high quality and condition?

A. That is true. Except in very rare instances I handle only stamps in first class condition.

Q. And you hold yourself out as being an experienced dealer, don't you? A. I do.

Q. If there is anything wrong with the stamps you do sell anybody, or they claim that there was, there is a question about it, you take them back without question, is that right?

A. Every one of my retail customers has received written statements from me that I offer to take back—— [47]

The Court: Just answer the question yes or no.

A. Yes.

Q. (By Mr. Bloom): Mr. Molesworth, I show you a letter on your stationery dated November 8th and addressed to Mr. Stephen W. Gerber, Menlo Park, California, and I will ask you whether you sent that letter to Mr. Gerber on the date it bears.

A. I did.

Mr. Bloom: I will offer this in evidence, if Your Honor please, as Plaintiff's Exhibit next in order.

(Letter dated November 8th, Molesworth to Gerber, was thereupon received in evidence and marked Plaintiff's Exhibit No. 8.)

Q. (By Mr. Bloom): This letter was written after the first publication? A. Yes, it was.

(Testimony of Jack E. Molesworth.)

Mr. Bloom: If Your Honor please, I would like to read this letter.

The Court: What is the date?

Mr. Bloom: This is November 8, 1948:

"Dear Mr. Gerber:

"I have read with interest your references to me in your October 30th column in Gossip.

"That our recent personal controversy motivated them, I have no doubt, but in spite of the personal contempt that you may have for me, I still believe that you will have the decency to print a retraction if I can furnish [48] proof that that which you have written is untrue. With one exception you quote from letters received from others the basis for which is apparently some specific auction dealing or dealings which they purportedly have had with me.

"For your consideration, I offer the following facts: (1) As you should already know, the number 460 which you intimate I personally substituted for No. 478 was purchased by me in a Boston auction as No. 478 and sold as purchased. I can furnish the auction catalogue to prove it and a statement by the auctioneer that he took the stamp back and refunded my money when it became clear that it was probably not No. 478, though there still was some doubt about its correct identity."

Q. By the way, you have brought, at my instance, the catalogue from that Boston dealer, have you? A. I have.

(Testimony of Jack E. Molesworth.)

Q. Identifying it as No. what?

A. As No. 478.

Q. No. 478? And you have also brought a letter from that dealer explaining this transaction and his mistake in connection with it? A. I have.

Mr. Bloom (Reading): "(2) My returns have for the most part been made within three or four days of receipt, occasionally after a week, and once or twice after about ten [49] days, in which cases the delay was occasioned by the necessity of having several lots expertized, which were doubtful. If you could see my stock, you could easily see that every item I buy and do not sell is certainly not returned. In fact, I never sell an item before paying for it as a rule."

Q. On my instance, you have brought from Boston all the invoices, all your books of account, all of your canceled checks covering transactions for the past two years, have you not?

A. I have.

Q. They are available in court for the inspection of counsel if he wants to seee them, is that correct? A. That is correct.

Mr. Bloom: "(3) I have never returned as much as 90 per cent of the lots purchased in a sale, unless you wish to take your own sale wherein the return of $191.00 item made the returns $205.75 out of $222.95. To the best of my knowledge, I get a catalogue from every major auction house in the country and not a single one has taken me

(Testimony of Jack E. Molesworth.)

off their list. I bid in most every sale held and have yet to have my bids refused, and with two exceptions have secured lots in every sale in which I have bid in the past four months."

Q. In that connection, you have letters, have you not, from the leading auction houses in the country, addressed to you, [50] expressing satisfaction with the manner in which you do business?

Mr. Arguello: I will have to object to that.

The Court: Yes, it calls for the contents of a written document.

Q. (By Mr. Bloom): You have those letters in the courtroom, have you not? A. I have.

Q. They are available for the inspection of counsel?

A. That is correct, fourteen of them.

Q. They are from the leading dealers?

A. Fourteen leading auctioneers in the United States, in my opinion.

Mr. Bloom: "(4) At no time have I returned $270 worth out of $300 worth and never have I held items two weeks, let alone two to three months, as you state in your column.

"Now you will probably say that these denials are just so much hot air, but I can prove them. If you will state which auction houses have written you the letters you quote, I shall be most glad to furnish my auction invoice on which I have recorded the returns along with reasons, plus my canceled dated check showing the date returns were

(Testimony of Jack E. Molesworth.)

made. I can immediately disprove your last $300 reference in this manner if you will but give me a chance.

"There is no doubt but what my standards are rigid, [51] but there is not one of the better NYC auction houses such as Harmer, Rooke; Lawrence & Stryker; John Fox; Edson Fifield; Irwin Heiman, or Eugene Costales, that will not give you a good report on me. Likewise, any of the Boston auction will tell you that I am a major buyer and a valued customer. They even held up the starting of the Pollitz and Paige auction since I had not yet arrived.

"Will you favor me with a chance to disprove your accusations by furnishing me with your sources, so that I can send you the facts?

"Sincerely yours, Jack E. Molesworth."

* * *

Q. Now, in response to the letter which was just introduced in [52] evidence, you received from Mr. Gerber, did you not, this letter dated November 19, 1948?

A. Yes, I received this letter in reply.

Q. This was also received after the first publication but before the second publication, right?

A. That is correct.

* * *

Q. At the same time you sent that letter of November 8 to Mr. Gerber you also sent a letter, did you not, to the publisher of Weekly Philatelic Gossip?

(Testimony of Jack E. Molesworth.)

A. The editor of Weekly Philatelic Gossip.

Q. Who is that editor? A. Harry Weiss.

Q. And you requested a retraction from the publication on account of that first article, did you not? A. I did.

Q. I show you a copy of the letter in which that request is [53] made dated November 8, 1948, and I will ask you if that is the letter in which you requested the retraction.

* * *

The Court: Are you going to offer the second publication?

Mr. Bloom: Yes.

The Court: Any objection?

Mr. Arguello: No, Your Honor.

The Court: Mark it, then.

(Letter dated November 8, 1948, Molesworth to Weiss, was thereupon received in evidence and marked Plaintiff's Exhibit [54] No. 10.)

Mr. Bloom: Now, in this second article that appeared in March, 1949, that commences:

"Gather Around, Dear Reader, and enjoy the funniest story ever told."

There is a statement in here, I want to get this correctly, that says, "So-o-o, said J. E. M. has filed a libel action against us for a paltry $150,000 to assuage his financial hurt as an upright, honest, unimpeachable and expert stamp dealer.

"Don't laugh yet. If selling a counterfeit stamp,

(Testimony of Jack E. Molesworth.)

if misrepresenting a stamp cataloguing at $40 as being one catalogued at $55, if unreasonable demands and claims, if allegedly unsatisfactory auction settlements—If, If, If, If all of these are distinguishing characteristics of an upright, honest, unimpeachable and well informed stamp dealer, then we apologize. (Laughter, please.)"

Q. In connection with that reference to the $40 stamp as being one catalogued at $55, I am going to ask you if that does not refer again to that No. 478 and No. 460 controversy from the stamp you originally bought from Mr. Gerber and which was the subject of comment in the first article, is that right? A. That is right.

Mr. Arguello: Counsel, he sold it to Mr. Gerber. You said bought.

Mr. Bloom: I beg your pardon. [55]

Q. That is the same stamp?

A. That is the same stamp, stated in a different way.

Q. That is the catalogue prices listed in Scott's, is that right? A. Yes, Scott's Catalogue.

Q. He has also in this article, "If selling a counterfeit stamp——," to shorten this record, I believe you know now what he has reference to there, have you not?

A. Yes, I believe I do.

Q. You have, as a matter of fact, the stamp in question in the courtroom in reference to a transaction with a dealer named Fox, is that cor-

(Testimony of Jack E. Molesworth.)

rect? A. Through an intermediary, yes.

Q. Through an intermediary named Larry Borenstein? A. That is correct.

Q. You have in your possession in the courtroom letters showing how the mistake was made in connection with that stamp and returning to Fox what money he had paid Borenstein for this stamp, is that right? A. That is right.

Q. By the way, what kind of stamp does he refer to as a counterfeit stamp?

A. It is a Confederate stamp, per catalogue number 8. It is a two cent red brown. I have the stamp on the table there.

Q. Would you mind getting it? Will you show His Honor the [56] so-called "counterfeit" stamp that you sold?

A. (Handing article to the Court.)

Q. Have you got one that does not bear the cancellation mark that this does?

A. May I explain?

Q. Explain to His Honor what that is about.

A. This stamp is genuine, Your Honor. It is not a fake. The cancellation on top of the stamp has been stated to be a fake by the best known experts in Confederate stamps. This stamp was sold through Larry Borenstein to John A. Fox, the leading dealer in Confederate stamps in the United States. Mr. Fox bought the stamp with the express understanding that if it wasn't genuine it could be returned.

(Testimony of Jack E. Molesworth.)

Mr. Arguello: I object to this.

The Court: Yes.

A. It can be proved, sir.

Mr. Arguello: I ask that that go out.

The Court: Yes, don't make statements.

A. Mr. Fox kept this stamp for five or six months, inserted it in an auction sale January 31st, 1949. The stamp would have been sold at auction had not an expert——

Mr. Arguello: I object to this testimony. He has no knowledge directly what would have happened to the stamp.

Mr. Bloom: I have documentary evidence. I am trying to connect this up. [57]

Mr. Arguello: Documentary evidence is as hearsay as the testimony.

The Court: I think you are anticipating, Mr. Bloom.

Mr. Bloom: Perhaps I am.

The Court: You are just piling up unnecessary evidentiary matter that it would be the burden of the defense to prove.

Mr. Bloom: Very well. The only reason I did this was the fact that I thought some of these reasons to somebody who wasn't familiar with the facts wouldn't make sense. However, I think your suggestion is well taken and we will wait until rebuttal to bring in these matters.

I now offer in evidence a third issue of Weekly Philatelic Gossip dated July 22, 1949, in which

(Testimony of Jack E. Molesworth.)
there was another reference and I offer it particularly on the question of continued malice.

(Thereupon Weekly Philatelic Gossip dated July 22, 1949, was received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Bloom: This article in Pets and Peeves starts off with the statement, "Molesworth to Dworak to Gerber. He's diddled it and put the ball into play again."

To save time, Your Honor can read the balance of that reference. That is all.

Cross-Examination

By Mr. Arguello:

Q. Mr. Molesworth, you stated you are employed by a bank, is that correct? [58]

A. That is correct.

Q. What was the name of that bank?

A. Rockland Atlas National Bank, Boston.

Q. What is your capacity there?

A. I am manager of the credit department, in training for junior loan officer.

Q. How many persons are there in the credit department?

A. In the credit department proper there are three people. I also have charge of the commercial service department which employs two.

Q. You are training for a higher position, is that correct? A. That is correct.

Q. That of junior loan officer? A. Yes.

(Testimony of Jack E. Molesworth.)

Q. How long is the ordinary bank training period to work up to that position?

Mr. Bloom: I don't know what that has to do with this action.

Mr. Arguello: I think it has a great deal. This boy is working up in a bank. It is obvious. He has already testified to it.

The Court: He has testified he works in a bank.

Mr. Arguello: He has also testified he is in training in the bank, working up to a better position in the bank. He also testified it is his desire to be a stamp dealer at the same [59] time. He is going to be one or the other, although he has no opinion as to one or the other. He comes into this court and states he is a stamp dealer, and he comes in and also says he is fully employed in a bank and working up in the bank. I am merely trying to determine what the true facts are.

Mr. Bloom: They are both true. They are not inconsistent.

The Court: I can't see that it makes much difference.

Mr. Arguello: I think it would have a bearing on the question of damages, Your Honor. I will withdraw the question.

Mr. Giometti: In that connection, Your Honor, I have a suggestion. I think there is also a question as to just what his capacity is. If, for example, Mr. Molesworth does not have the position of a stamp dealer and that position is just a hobby,

(Testimony of Jack E. Molesworth.)

for example, then of course he will have to show special damages, and in failing to do so there can be no recovery, so I think this whole question as to his occupation and his background——

The Court: You can question him as to how much time——

Mr. Bloom: Certainly.

The Court: ——the nature of his business, but how much training he got in the bank, I don't see is material. Sustain the objection to the last question.

Q. (By Mr. Arguello): Mr. Molesworth, you put in, as you testified, 40 hours a week in the bank?

A. That is for which I am paid. Actually it is nearer 30 [60] hours.

Q. And your training, does that consist of any extra time? A. None whatsoever.

Q. I see. In other words, the bank training totals this 40 hours for which you are paid?

A. That is correct.

Q. In addition to that time, you testified that you spent 30 hours on your stamp business?

A. That is correct.

Q. That is 70 hours a week you spend in working on stamps or in the bank?

A. 30 and 30 are 60 hours a week.

Q. You testified you got paid for 40.

A. That is correct. I am not on an hourly basis. I am paid by the week.

(Testimony of Jack E. Molesworth.)

Q. I see. You testified you started dealing in stamps as a stamp dealer when you were 13, is that correct?

A. I believe I said I was 14.

Q. You said you had been in business ten years and are 23 today, is that what you said?

A. Depends on where you start it and end it.

Q. At 14 how did you handle your business? Did you buy and sell nationally at that time?

A. Yes, I did, on a very small scale.

Q. Did you bid in national auctions, national auction sales, at [61] 14?

A. Yes, I bid in one sale.

Q. Did you get stamps at that sale?

A. Yes, I bought stamps at that auction.

Q. Did you have any trouble qualifying as a bidder at 14 years old?

A. None whatsoever. My age wasn't brought into the matter. My references were satisfactory.

Q. As a matter of fact, you have a personal stamp collection, do you not? A. I do not.

Q. Did you have one at 14? A. I did.

Q. When did you sell that personal stamp collection?

A. I believe the collection was sold some time between 1940 and 1943. The exact time I do not know. It wasn't, as I recall, sold as a collection, but was broken down into stock, I think.

Q. You testified you were in the navy for a period of time. While you were in the navy, you carried on your stamp business, did you?

(Testimony of Jack E. Molesworth.)

A. I bought and sold very little except during the year 1944.

Q. You did carry on the stamp business while you were in the navy? A. Yes. [62]

Q. As a practical matter, you went to considerable stamp conventions while you were in the navy?

A. No, I went to only one stamp convention while I was in the navy.

Q. That was in Chicago?

A. That is right.

Q. You bought and sold in that? A. I did.

Q. You were in the navy?

A. I was on terminal leave. I had been separated at the time.

Q. You were in uniform at the time, though?

A. That is correct.

Q. You testified your income from stamps in 1948 was $20,000. That was your volume, wasn't it?

A. That is correct.

Q. You didn't mean to imply you made $20,000 from stamps in 1948? A. No, I didn't.

Q. What do you think your income from stamps in 1948 amounted to?

The Court: You mean net?

Mr. Arguello: Net income, Your Honor.

A. In the year 1948 the net income, I would say, was approximately $2500. [63]

Q. (By Mr. Arguello): Do you think it was more or less?

(Testimony of Jack E. Molesworth.)

A. Approximately that amount. Could have been more, could have been less.

Q. In 1947 you testified that your volume was $15,000. What was your net in 1947?

A. It would be roughly $1500, I would say. The determination—may I explain it?

Q. Yes, go ahead.

A. The determination of income is strictly dependent on how one values the inventory, Your Honor.

Q. At the time and skipping all this preliminary questioning, Your Honor, with regard to when these two people met, in the interest of time, and getting to the sale of 460 and 478, how are those stamps distinguished, Mr. Molesworth?

A. The stamps are distinguished by the watermark, the absence in one case and the watermark being there in the other case.

Q. When you sold a stamp of a type that has but one distinguishing characteristic, in the conduct of your business were you, or did you, usually make a check—— A. Very definitely.

Q. ——as to the characteristic?

A. Very definitely.

Q. I see. Did you make a check in this instance?

A. I believe after purchasing at auction I did, because that is my customary procedure. [64]

Q. However, the stamp went out and was not

(Testimony of Jack E. Molesworth.)

the stamp you represented it to be, is that correct?

A. That fact is not definitely established, but an expert has stated that in his opinion, it was 460 and not 478 as it was sent out.

Q. So far as you know, the stamp was not the stamp you represented it to be, is that correct?

A. That is correct.

Q. Now, you sold the stamp to Mr. Gerber for a profit? A. Yes.

Q. You were holding yourself out as a stamp dealer at the time? A. Yes, I was.

Q. In the purchase and sale of stamps in the conduct of the business that you have on the side, what is your ordinary procedure as to the purchase of stamps?

A. Will you be more specific? I don't understand.

Q. What check do you do with regard to the stamps you buy?

A. I check the cancellation for soundness. That generally in a stamp is the only thing of significance. The fact that there may or may not be a fake in the United States stamps is a risk which very seldom ever comes about. United States stamps as a general rule are not faked. It is practically an impossibility.

Q. Would the cancellation——

A. Cancellation can be faked. The stamp in question was a [65] Confederate stamp, which is different from United States stamp.

(Testimony of Jack E. Molesworth.)

Q. Do you refer, however, to reference sources with regard to the identification of the various stamps?

A. Generally I need not refer. I have that within my own philatelic knowledge.

Q. However, of course you missed on these?

A. That is right; well, with a check for watermark.

Q. Did you do that in that case?

A. I said I thought I did, yes.

Q. As a practical matter, checking watermarks is a very simple operation, is it not?

A. The operation is simple, but the determination of watermark in many cases is not.

Q. You have a little set there with you, don't you? A. Yes, sir, I do.

Q. Will you show the Judge what that is? It is a little tray on which a stamp is placed, benzine or some other liquid like benzine, placed on the back of the stamp and the watermark shows up. Now, in the inspection of a stamp and checking the identities you state that that matter is often within your own knowledge, is that correct?

A. That is correct.

Q. However, there are stamps you have to make reference to a source material for, is that it?

A. Occasionally, yes. [66]

Q. We will talk about this No. 207, Confederate. This stamp was sold by you to John A. Fox, you testified.

(Testimony of Jack E. Molesworth.)

A. No, the stamp was sold to Fox by Larry Borenstein who had my material on consignment.

Q. It was your stamp?

A. It was my stamp.

Q. Did Borenstein get any profit from the sale?

A. A small profit, yes.

Q. He sold it at the price you wanted, didn't he?

A. That is not correct. The stamp was sent him at a price. He got a small profit, only about a dollar.

Q. Before the sale of that stamp, did you check it? A. Yes, I checked it.

Q. How did you check it?

A. I checked it by reference to Scott's U. S. Specialized Catalogue. In that catalogue under "Confederate Stamps" you will find cancellation imprinted on the page.

Q. Did you feel you had adequate reference material to properly check this stamp at the time you checked it?

A. There is reference material which would have been of value which I did not have.

Q. But you felt at the time that you checked it——

A. May I explain my location at the time this came about? I was on an island in a lake in New Hampshire at the time this came about. Reference material was not readily available. [67]

Q. You were carrying on your business as a stamp dealer, though? A. That is correct.

(Testimony of Jack E. Molesworth.)

Q. Holding yourself out as a stamp dealer?

A. I did and still do.

Q. In regard to the general policy of selling a stamp, and especially in this high class clientele you referred to, do you take the responsibility for seeing that stamp is a good one or do you sell to the buyer at his own risk?

A. I sell stamps that, to the best of my knowledge, the stamp is genuine and I will take it back if it is ever determined otherwise any time within my lifetime.

Q. However, you want your clients to trust you? You want them to rely on you as selling them valid merchandise, is that right? A. I do.

Q. And you hold out anything you sell to them as an all right stamp? A. I do.

Mr. Arguello: I am going to ask about this letter (handing to counsel). This is a copy, Your Honor. I have made a demand upon plaintiff's counsel for the production of the original, which they have not done.

Mr. Bloom: Wait a minute. You haven't asked me for the original. [68]

Mr. Arguello: Excuse me. Do you have the original?

Mr. Bloom: I have the original. I don't think it is in as good condition as that copy, but I don't want you to give the Court the idea I am refusing to give you the original, if I have it. No, I guess I have another copy. I beg your pardon. That

(Testimony of Jack E. Molesworth.)

was sent to Borenstein. I just have another copy. I wouldn't have the original of that.

The Court: Is there an objection to this letter?

Mr. Bloom: No objection.

The Court: All right.

Q. (By Mr. Arguello): I call your attention to this letter that you wrote to John Fox, copy going to Larry Borenstein. Is that the letter you wrote?

A. That is the letter I wrote.

Mr. Arguello: I would like to introduce this as Defendant's exhibit.

(Letter, Molesworth to Fox, was thereupon received in evidence and marked Defendant's Exhibit A.)

Mr. Arguello: I would like to refer to it. If you prefer, I will read the whole thing.

The Court: Whatever you wish.

Mr. Arguello: It is addressed to Mr. John A. Fox, 116 Nassau Street, New York 7, New York.

The Court: What date, please?

Mr. Arguello: February 28, 1949. [69]

(Reading Defendant's Exhibit A.)

Q. Mr. Molesworth, at the time of this sale you felt that Mr. Fox should have checked this stamp he bought from Larry Borenstein right away, is that correct?

A. That is correct, since he bought it with that understanding.

(Testimony of Jack E. Molesworth.)

Mr. Arguello: I will ask that the last part of that answer go out as not responsive.

Mr. Bloom: I will ask it stay in. That is responsive.

The Court: You ask him if he felt something, and that always opens the door, I think. It makes no difference. Let it stand.

Q. (By Mr. Arguello): You stated that he should have had his own expert check it after he bought it from you, is that correct?

A. That is correct.

Q. Do you feel that way when you sell stamps to general clientele?

A. No, sir, I do not. In this case there was a doubt. That is the reason the express understanding was made, and Mr. Fox is supposed to be an expert in his own right.

Q. It seems to me most stamp collectors set themselves up as experts.

A. Very few do. [70]

* * *

Q. Have you noticed, incidentally, in your experience and in your dealing with other dealers, any falling off generally in [71] the philatelic business in the last year?

A. No more so than 1947, no.

Q. You say that the level of business is about the same in 1947, 1948 and 1949?

A. That all depends on the individual dealer. I

(Testimony of Jack E. Molesworth.)

would have to see the records of the dealers to determine whether business has fallen off.

Q. I ask you if you have discussed it in your talks with stamp dealers. A. Yes, I have.

Q. I asked you if you have received the general impression in the course of doing so there is a falling off.

Mr. Bloom: I object to that as speculative, calling for a vague answer and a matter of opinion.

Mr. Arguello: I think it is a subject always discussed by business men.

Mr. Bloom: I know, but you are asking for hearsay. You are asking for a conclusion, namely, the state of the business based on hearsay, that is what that calls for.

A. I would be glad to answer the question.

The Court: Well, let him answer it then.

A. Stanley Gibbons, one of the largest dealers in the United States, has published a statement his volume is considerably in excess of 1943 during the year 1948. It is the only published statement I have seen, and that has been run in several places. He has told me that personally. I mean, 1949 is higher than 1948.

Q. Did he say anything about 1947 and 1948?

A. No, 1947 was not discussed.

Q. Have you noticed any falling off in your own business—withdraw that. Referring again to values, has there been any depreciation in the values of stamps in the last year, let's say, that you have noticed?

(Testimony of Jack E. Molesworth.)

A. In the last year? Not particularly so.

Q. The last two years?

A. More so, yes. Since 1946 some stamps have declined quite a bit, speculative items; others have declined only about 10 per cent. The quality merchandise I handle is in the latter category. [73]

* * *

Q. In the purchase of and in the operation of your business you testified that you buy at many auctions and from many dealers. Did you ever buy any stamps from Hy Bedrin, New York?

A. Yes, I have.

Q. Did you buy any stamps from him in November, 1947? Check your books, if you like. [75]

A. I would like to.

Mr. Bloom: I don't know what the materiality of this is. It doesn't seem within the scope of the direct examination.

The Court: I don't know what it is he has in mind, although I expect it would be harmless, this particular question would be harmless as to whether or not he bought any stamps. He may be laying a foundation for something.

Mr. Bloom: He may be.

The Court: It may subsequently appear to be objectionable or not within the issues. Are you able to answer the question?

A. Yes. No, I did not buy stamps of Hy Bedrin in November, 1947.

Q. (By Mr Arguello): Did you buy any stamps

(Testimony of Jack E. Molesworth.)

from him in December, January or February following that November?

A. Yes, I did in December.

Q. $200 worth of stamps from him at that time?

A. No, I bought $351.50 worth. That was the invoice value, that is.

Mr. Arguello: May I look at those invoices, please?

Mr. Bloom: Well, Mr. Arguello,——

Mr. Arguello: One of the statements he made——

Mr. Bloom: Wait a minute.

Mr. Arguello: ——dealt with this $300 purchase.

Mr. Bloom: You mean a statement Mr. Gerber made?

Mr. Arguello: No, a statement you questioned him about on [76] direct examination and he stated he didn't make a purchase of $300 and returned $270.

Mr. Bloom: All right. You are referring—These questions, I take it, refer to that statement of Mr. Gerber's in the article about purchase of $300 and return of $270, is that it?

Mr. Arguello: No, to the statement you asked about on direct examination, Mr. Bloom.

Mr. Abrams: Wasn't a purchase of $300 because so far there is no purchase of $300.

The Court: Are you trying to find out in this particular purchase how much the plaintiff returned?

Mr. Arguello: Yes.

(Testimony of Jack E. Molesworth.)

The Court: Can you recall whether or not you returned it?

A. Yes, I have the exact data.

The Court: How much of it did you return?

A. I purchased $351.50 and $274.15 was returned.

Q. (By Mr. Arguello): What was the purchase?

A. $351.50 plus 60 cents postage and insurance. The returns were $274.15.

Mr. Bloom: I take it, Mr. Arguello, this return——

The Court: Let's not, to save time, argue about it. It is a matter of no consequence. Suppose he did return them? Why do you object to it?

Mr. Bloom: I just wanted to see where it fits in the case.

Mr. Arguello: It is one of the allegedly libelous statements [77] in one of the articles.

The Court: That isn't the part of it that is apparently objectionable. I suppose anybody is entitled to return merchandise. What do your records show as to when you returned it?

A. The receipt was invoiced, dated December 19, 1947, presumably at the time they were made up in New York City. These were all sent to me from New York City. I was on a Christmas vacation at the time and there was the delay of the Christmas holidays, but my payment to them dated January 10, 1948, and according to my records, I did not actually receive these, or at least have opportunity to examine them until January of that year. Re-

(Testimony of Jack E. Molesworth.)

turns were made within ten days of my actually receiving for the purpose of doing business, not two to three months, as stated in the article.

* * *

Mr. Arguello: If the party feels that the article was printed believing it true by Mr. Gerber, I think that would have a bearing as to whether Mr. Gerber had actual malice or not.

The Court: I assume plaintiff wouldn't be in court if he had an opinion that the defendant was acting in good faith.

Mr. Arguello: He wrote a letter to that effect, Your Honor.

The Court: He did what?

Mr. Arguello: He wrote a letter to that effect. That is why I am asking the question.

Mr. Abrams: That is not exactly so.

Mr. Arguello: To an associate editor, as a matter of fact, [80] of Weekly Philatelic Gossip.

The Court: Go ahead.

Mr. Arguello: "Regarding myself and your fellow columnist, Gerber, we got into a personal argument this summer when he declined to take gracefully what was meant as constructive criticism of his Gossip column and some damaged and off-centered lots I got in a wholesale auction of his last spring. He proceeded to reflect on my integrity, though he knew nothing about me and my defensive replies (an offense is the best defense) in which I minced no words made him blow his top. About

(Testimony of Jack E. Molesworth.)

four months after my last letter to him, he came out in Gossip with a blast against me and my manner of auction buying, his information coming from some of the NYC boys whom I had verbally chastised for selling repaired, regummed, damaged, and out-and-out faked stamps. The catch is that he fell for their line without checking with me as he erroneously states his policy to be, and as a result printed charges which have no basis and are either completely false or a distortion of the truth. Actually he probably believes what he printed is the truth, but he'll have a rude awakening when he tries to prove it in court."

Q. Do you remember writing that?

A. Yes, I wrote that.

Q. "You know how I operated when we had weekly dealings and I have not changed, but rather, in my own way, carried on a [81] crusade against the shady ones, just as Gerber, and it is quite ironic that we should end up like this since we both are for the same thing."

Do you remember writing that?

A. Yes, I remember. [82]

* * *

Redirect Examination

By Mr. Bloom:

Q. Just one or two questions. By the way, this Larry Borenstein to whom you wrote that letter, who is he in relation to the Weekly Philatelic Gossip?

(Testimony of Jack E. Molesworth.)

A. He is an associate editor of Gossip and writes a column in Gossip occasionally.

Q. After these articles had been printed there was [88] correspondence between Mr. Gerber and Mr. Borenstein and you and Mr. Borenstein, was there not? A. Yes, that is correct.

Q. What was the purpose or reason for all of that correspondence?

A. Mr. Borenstein apparently was acting as a self-appointed intermediary to try and get the case dropped.

Q. As a matter of fact, you have a lot of correspondence here with Mr. Borenstein and copies of letters of Mr. Gerber's in reference to his acting as intermediary, do you not?

A. I do have, yes.

Mr. Bloom: Your Honor, I am not going to clutter the record with this correspondence, but I want to show from what context it is taken.

The Court: All right.

Q. (By Mr. Bloom): I show you one letter, however, from Mr. Gerber, on his stationery, addressed to "Dear Larry"—presumably Larry Borenstein—from Menlo Park, February 20, 1949, and I will ask if Mr. Borenstein sent to you that part of the letter that Mr. Gerber wrote to his associate.

Mr. Arguello: I will object to that because it assumes the fact that this letter was written by Mr. Gerber.

The Court: Yes. You needn't go any further

(Testimony of Jack E. Molesworth.)

with that. Have you anything showing this letter was actually written by Mr. Gerber? [89]

Mr. Bloom: I will put Mr. Gerber on the stand. It is on his stationery.

The Court: You could do that later.

Mr. Bloom: I thought he would agree to have it go in.

Mr. Arguello: I am not sure. Let's look at it. Possibly you can get it in.

Mr. Bloom: There is a statement in that last letter to Mr. Borenstein to the effect that—Well, I will read it; there is a sentence in here which says, "Actually he probably believes what he printed is the truth, but he'll have a rude awakening when he tries to prove it in court." What did you mean by that expression?

A. I meant I believed Mr. Gerber would believe the worst about anyone, as his writings will show, without checking the same to see if it is correct.

Mr. Arguello: I object to the question and the answer. The letter speaks for itself, your Honor.

The Court: Yes; it may go out.

Mr. Bloom: Have you any objection to this catalog?

Mr. Arguello: No.

Q. (By Mr. Bloom): I show you a catalog of W. T. Pollitz, Boston, Massachusetts, in reference to sales at auction conducted September 26, 1947, and the 27th of that month and year, and I will ask you if that is the catalog you used to purchase the

(Testimony of Jack E. Molesworth.)

No. 478 stamp that was subsequently sold to Mr. Gerber. [90]

Mr. Arguello: I object to that question. I don't see where it is material. There is no way we can get into it by way of cross-examination. It is completely self-serving. This party could have secured this catalog any time.

Mr. Bloom: You are charging without any basis he goes and sells fictitious stamps and counterfeits. I am going to show where he got the stamp. One of the biggest dealers in the country listed it as a certain stamp for which he later sold it.

The Court: What is the question?

Mr. Bloom: The question is whether he used that catalog in the purchase of the stamp in question.

The Court: Overrule the objection.

A. Yes, I used this catalog.

Q. (By Mr. Bloom): Will you show us where the particular stamp in question is advertised for sale? A. Lot 188, $1 fine o.g., catalog $50.

Q. You bid at that auction for this stamp?

A. I bought that stamp at that auction.

Q. And you bid how much for it?

A. As I recall, $31.

Q. That was the proper price, was it not, for that stamp as a 478 stamp?

A. Yes, that would have been.

Mr. Bloom: If there is no objection I would

(Testimony of Jack E. Molesworth.)

like to [91] introduce this catalog in evidence as plaintiff's next exhibit.

(The catalog was marked Plaintiff's Exhibit 12 in evidence.)

Q. (By Mr. Bloom): I think you testified that the only difference between the 478 and the 460 was a matter of a watermark? A. That is correct.

Q. Do you have the stamp in question with you?

A. I have a No. 460 and No. 478 which I purchased yesterday from a San Francisco dealer.

Q. You have the 478 in question with you, or don't you?

A. No, I don't have. That stamp was returned to the auctioneer and refund was made.

Q. Would it be easy or difficult to determine whether that stamp is watermarked?

A. It would depend on where the stamp was in the set. The catalog will show this particular stamp was very difficult to determine the watermark, and in fact, I myself never did see a watermark on it.

Q. Tell his Honor why it was difficult.

A. Sometimes, your Honor, a complete watermark will show on a stamp. In other places in the set only a portion of the watermark will show on the stamp. One copy on a certain stamp may have a very obvious watermark, and another copy may have [92] one very difficult to detect. In this case the stamp had been placed in an album with a hinge on it, and it left a mark there which increased the difficulty of seeing the watermark, especially if the

(Testimony of Jack E. Molesworth.)

stamp is under the hinge, which was the case in this instance.

Q. Here is a letter dated August 24, 1949, from W. T. Pollitz, from whom you bought that stamp. Is that letter you received on or about that date?

A. Yes.

Mr. Bloom: I offer it in evidence as plaintiff's next exhibit.

Mr. Giometti: We object to the introduction of that letter. I don't see what purpose it would serve. It is immaterial. He is trying to show that he purchased the stamp that was sold for something correct, and the whole basis of this case is whether or not he did sell a stamp that did not represent what it should to Mr. Gerber.

The Court: Well, those facts have already been developed. He did do that. You have already had the witness testify to this. Does this letter add anything?

Mr. Bloom: Yes, it does, because W. T. Pollitz, one of the biggest dealers in Boston, it shows he made the statement upon which he made his mistake and the reason.

The Court: All right, I will let it in.

(The letter was marked Plaintiff's Exhibit 13 in evidence.) [93]

Q. (By Mr. Bloom): In that second article of Mr. Gerber's, this talk about the counterfeit stamp, to whom was the counterfeit stamp ultimately sold by Mr. Borenstein?

(Testimony of Jack E. Molesworth.)

A. To Mr. John A. Fox, a dealer in New York City.

Mr. Giometti: I object again. I don't see what difference it makes to whom the counterfeit stamp was sold. What difference does that make in this case? The action of the defendant is upon the fact that he did something. His motive is immaterial.

Mr. Bloom: As I understand it, his principal defense appears to be truth. I am going to show that that defense is groundless. He has cross-examined him——

The Court: Of course, you are again anticipating, somewhat.

Mr. Bloom: As I understand it, your Honor, he has cross-examined this witness about a certain Confederate stamp.

The Court: Yes. Well, I think the cross-examination has in truth opened up that field somewhat. Have you got a lot more letters you are going to introduce in evidence?

Mr. Bloom: Not to take up too much time, I will confine my offer now to a letter from the dealer in question, Mr Fox.

Q. Explain that transaction. I show you two letters from John A. Fox of New York City, one dated March 2, 1949, in reference to this Confederate stamp which has been talked about. Did you receive that letter from Mr. Fox? [94]

A. Yes, I received this letter.

(Testimony of Jack E. Molesworth.)

Mr. Bloom: I offer this as plaintiff's next in order.

Mr. Arguello: I will object to that letter. The letter states that he, the buyer, John Fox, discovered it was a counterfeit and that he returned it to him.

Mr. Bloom: And apologized for its late return. He explains why there is a late return. He had no inkling it was wrong when he bought it from Larry Borenstein and that is the reason for the delay.

Mr. Arguello: I don't see any reason for the delay.

Mr. Bloom: You have brought up the question that he didn't return the money for a long period of time. You opened it up.

The Court: Let me see the letter. Well, I will overrule the objection.

(The letter was marked Plaintiff's Exhibit 14 in evidence.)

Q. (By Mr. Bloom): Here is a letter from the same Mr. Fox, purportedly dated August 26, 1949. Did Mr. Fox give that letter to you on or about the date it bears? A. Yes, Mr. Fox did.

Mr. Arguello: I object to this letter. It is an avowal of good character on the part of Mr. Molesworth, a statement by Mr. Fox to that extent.

The Court: I think it has some bearing on the matters that this witness is questioned on. [95]

Mr. Arguello: It is solicited in answer to a letter from Mr. Molesworth upon which we have no oppor-

(Testimony of Jack E. Molesworth.)

tunity to cross-examine, no opportunity to go into, and offered gratuitously at this time.

Mr. Bloom: He attempted to impugn the integrity as a justification for the article by bringing in the Fox purchase. Here is a letter from Mr. Fox saying——

The Court: Let me see the letter first.

Mr. Bloom: Yes, your Honor.

The Court: Just a moment. I can't understand what you are talking about until I see the letter. Well, I think the objection to this letter is good. This is a hearsay statement of opinion by a third person who is not present.

Mr. Bloom: Yes. I didn't understand him to object on that ground.

The Court: Well, maybe he didn't. Sustain the objection. You may have it marked for identification.

Mr. Bloom: Thank you, your Honor.

(The letter was marked Plaintiff's Exhibit 15 for identification.)

Mr. Bloom: That is all.

Mr. Giometti: Your Honor, I have a question I would like to ask.

Recross-Examination

By Mr. Giometti:

Q. Will you look at these stamps and tell [96] me what they are.

A. How do you mean, what they are? What catalog number?

(Testimony of Jack E. Molesworth.)

Q. Yes.

A. That would be either 460 or 478, depending on the watermark. Both perforate 10.

Q. Can you tell from looking at those which is which?

A. No, they would have to be watermarked.

Q. Would you show the stamp to the Court.

Mr. Giometti: Your Honor, one of those stamps is a 460 and the other is a 478. Now, the purpose of showing this is to show that these stamps are so similar that a party must test them to ascertain which is which.

The Court: That is what he just said.

Mr. Giometti: That is what I wish to show and I wish to show how you can test them and how very simple it is to show the difference between the two stamps.

Mr. Bloom: Do I understand he is proposing to examine the stamps?

The Court: I am not going to take time to hear that. I don't see any point to that.

Mr. Giometti: It is simply to show that the stamps can be taken and tested——

The Court: That may be true. Maybe this man is not too competent as a stamp dealer, I don't know, but that is not the question we have before us. [97]

Mr. Bloom: More important, there may be 10,000 different kinds of watermarks or conditions of stamps.

(Testimony of Jack E. Molesworth.)

The Court: I am not going into the matter as to whether that is a good dealer, but much of an expert he is in the field.

Mr. Giometti: The question, if I may urge it, your Honor, is that he has sold these stamps.

The Court: It may be he made many common mistakes. That is beside the question. The question is whether or not there is any justification for these articles in the press. Every time these columnists don't like somebody isn't any excuse for their breaking forth with this sort of literature. I can't try out whether or not this man, this plaintiff, is competent in the mind of someone else with respect to his identification of stamps.

Mr. Giometti: Very well, your Honor.

The Court: I can't see any purpose in going into it. I am not attempting to cut off your examination, but I don't see any point in an examination of the stamps before me in this case. What we have said is sufficient to make a record, so if I am in error you have it in the record.

Mr. Giometti: That is all. [98]

* * *

STEPHEN WARD GERBER

called for the plaintiff under Section 43(b); sworn.

* * *

Direct Examination

By Mr. Abrams:

Q. Where do you live, Mr. Gerber?

A. I am at present living in Montrose, California. [99]

Q. For some years you lived in San Francisco?

A. That is correct.

Q. You testified for almost a day on Tuesday of this week?

A. The deposition you took, yes.

Q. You stated, among other things, did you not, on Tuesday that you have been considered an authority in United States stamps?

A. I don't recall that, unless it was read to me.

Q. You don't recall what you said on Tuesday?

A. To a great extent. I don't recall I said was an authority on United States stamps.

Q. Well, I will call your attention to this question and answer at page 13 of this deposition:

"Well, you are considered in the business or in the trade as an expert stamp collector, are you not, as an expert on stamps?

"Answer: I probably am, yes.

"Question: Your opinions are respected in the trade, are they not?

"Answer: I believe they are."

Does that refresh your memory?

(Testimony of Stephen Ward Gerber.)

A. That answers itself. It is different from your question. Your question wasn't that. Difference between "opinion" and "probably" I am an expert. I am not expressing an opinion.

Q. You never expressed an opinion you are an expert? [100] A. No, sir.

Q. You stand by what you testified to on Tuesday, don't you? A. Surely.

Q. And you testified you got fan mail from all over the country, didn't you? A. Yes.

Q. And that the Weekly Philatelic Gossip was printed, edited and published in Kansas with a circulation of about 15,000 copies, weekly?

A. Two weeks. One of them is correct and the other incorrect.

Q. I am trying to hurry along. Please answer, if you can.

A. I cannot. The answer to that would be "No."

Q. All right, page 14 of that transcript. Was this question asked you:

"Now, in connection with the Weekly Philatelic Gossip, can you tell us where it is published?" Your answer:

"At Holden, Kansas.

"Question: It is printed, is it, in Holden, Kansas?

"Answer: Printed and edited and circulated from Holden, Kansas."

Mr. Arguello: We will stipulate to the fact that

(Testimony of Stephen Ward Gerber.)

it is printed, edited and circulated at Holden, Kansas.

Mr. Abrams: He has denied he made the statement. [101]

Q. This question: "Do you know what their circulation is?

"Answer: No, only by rumor. They never publish circulation figures. I understand from information that is available that it is about 15,000." Did you so testify?

A. I did so testify. I testified I didn't know the circulation.

Q. Did you also testify that from your experience with the magazine it was presumably circulated throughout the United States?

A. I also testified that I supposed, just my opinion, and I have no opinion of their business, and I so testified.

Q. Please—— [102]

* * *

Q. You so testified that you have received letters from every part of the country, haven't you?

A. I did.

Q. And that with regard to the publication of these matters that are at issue, you testified, did you not, that you were completely indifferent as to what you published about Mr. Molesworth?

A. That is a wrong phraseology. That is your phraseology, not mine.

Q. You deny you so testified under oath on Tuesday? A. I deny that. [103]

(Testimony of Stephen Ward Gerber.)

* * *

Q. (By Mr. Abrams): Well, Mr. Gerber, were you completely indifferent to what you published about Mr. Molesworth at the time you published it?

A. Certainly not.

Q. Did you on Tuesday of this week testify as follows, and I have page 137 of the record——

Mr. Arguello: May the witness refer to the record?

Mr. Abrams: Do you have a copy of this?

Mr. Arguello: I couldn't afford a copy.

Mr. Abrams: Is that a statement for the record, you couldn't afford a copy?

Mr. Arguello: Yes, it is a statement for the record.

Mr. Abrams: All right.

Q. I hand you the deposition, page 137, and show you the following, Mr. Abrams' question:

"Were you completely indifferent to what you published about Mr. Molesworth?"

And what is your answer?

The Court: You read it.

A. It says here, "Yes," but the answer is No.

Q. (By Mr. Abrams): Are you telling the Court that the official stenographer that took this put a "Yes" down when the answer was "No"?

A. The answer is very obvious. You're using the same tactics you did before.

The Court: I can't hear everybody at one time. Sit down and be patient and we will go on. Let's

(Testimony of Stephen Ward Gerber.)

proceed in an orderly way. Suppose you step around, Mr. Abrams, to the front. Read the question and answer and ask if he made the answer. He has a right to make his answer.

Q. (By Mr. Abrams): Do you remember the question and answer, Mr. Gerber?

A. I remember your question. The answer is No. I could explain how that could have occurred. I might not have understood your question. You continually riled me, trying to work up a heart attack.

Mr. Abrams: May that be stricken, your Honor, as not responsive?

The Court: Yes. Will you give me the record? If I can't get the lawyer to ask the question, I will do so myself. The question as asked you, Mr. Witness, is this, page 137 of the deposition, and I want to know whether you gave the following answer to that: "Were you completely indifferent to what you published about Mr. Molesworth? Answer: Yes." Did you make that answer?

The Witness: To my recollection, that is not so.

The Court: You are sure you did not answer that?

The Witness: I didn't answer "Yes" to that.

* * *

Q. (By Mr. Abrams): Did you also testify—I am sorry. Is it a fact, Mr. Gerber, that what effect your articles would have on Mr. Molesworth's future was of no consequence to you in writing the article in question?

(Testimony of Stephen Ward Gerber.)

A. There would be no way I could know what effect it would have on his future. [107]

* * *

Q. (By Mr. Abrams): Did you care what effect your writing these articles would have on Mr. Molesworth?

Mr. Arguello: I suggest this is the same type of question he asked, asking for the opinion of one of the parties.

The Court: I don't know what his answer would be.

Mr. Abrams: His opinion is one of the prime elements in the case, namely, whether he acted with malice.

The Court: Read the question to the witness, please.

(Question read.)

The Court: Overrule the objection. The witness may answer.

Q. (By Mr. Abrams): Did you care, Mr. Gerber?

A. Yes. Well, I couldn't answer that yes or no. You see, I wrote those articles without——

Mr. Abrams: May I interrupt the answer? Anything further, I submit, would not be responsive to the question.

The Court: Not necessarily. When you ask a question that calls for the state of mind of a witness you can't necessarily shut him off.

Mr. Arguello: Complete your answer. [108]

(Testimony of Stephen Ward Gerber.)

A. Yes. In writing those articles I was struck by certain interests that I consider highly motivated, and my only object—I had no other object in the world, never did and still don't have and I couldn't have any other object than to work on behalf of a cause in which I believe. Very often I couldn't—to make that clear—I want to be brief, I know how it is and I want to go ahead. If I knew of a crime committed on the street and I grabbed the criminal, I wouldn't consider what effect it would have on him. The subject of those articles was 100 per cent objective to me. I dealt with a situation of a man doing something wrong. I published the facts to the best of my knowledge and belief, in honesty and sincerity and guided by no malice.

The Court: Thinking you had the facts when you wrote that article?

The Witness: Yes, your Honor.

The Court: Why did you write those articles in the way you wrote them?

The Witness: Well——

The Court: Don't you think that the language of those articles is sardonic and intemperate, to put it mildly?

The Witness: Probably you could draw that conclusion, but it is honest and it is true. The choice of words may not agree——

The Court: I suppose the question opened this up. [109]

* * *

(Testimony of Stephen Ward Gerber.)

Q. Before writing the article did you write Mr. Molesworth and ask for his side of the story you had received?

A. It wasn't necessary, in my opinion.

The Court: No, no. Did you?

The Witness: No.

Q. (By Mr. Abrams): Did you give Mr. Molesworth a chance to defend himself or to produce evidence before you accepted the statements that you had from other people about him? [110]

A. Yes.

Q. Now, I call your attention to page 68 in the record.

"Question: Did you"——

Mr. Arguello: Let the witness read the page.

The Court: All Mr. Abrams is doing is saving time by showing it to him and reading it at the same time.

Q. (By Mr. Abrams): "Did you give Mr. Molesworth a chance to defend himself and to produce evidence before you accepted a statement from other people? Answer: I don't recall doing so."

The Court: The question is, Did you give that answer?

A. I probably did. I didn't recall doing so. I thought I did answer "Yes," because I remember one instance where it seemed to me I did so. It isn't a very emphatic "Yes."

Q. (By Mr. Abrams): You realized at the time you wrote the article, Mr. Gerber, that when you

(Testimony of Stephen Ward Gerber.)

said, "The Mole's worth will have to be tested in a different racket," you were referring to Mr. Molesworth's operation as a racket, weren't you?

Mr. Arguello: Objection. I think the article speaks for itself. There is no point in going into each and every line of the article; it is in evidence.

The Court: Overrule the objection.

Q. (By Mr. Abrams): Isn't that right?

A. I gave a five-page explanation of what I consider a racket. [111]

Q. Will you please answer the question so we can get along. Have you lost the question?

The Court: Read it to him.

(Question read.)

A. I will have to answer with an explanation of what I consider a racket. When I express myself and use a word I am entitled to make a definition. [112]

* * *

Q. (By Mr. Abrams): When you accused Mr. Molesworth of substituting a No. 460 for a 478 stamp in that article, you, after forty years' experience in the business, called it a 50-cent stamp, didn't you?

Mr. Arguello: Objection. I can't see what bearing that has on the issue as to whether or not Mr. Molesworth sold a [113] 460 or 478.

The Court: Mr. Abrams, I don't know what the practice is in the district from which you come, but this line of examination is highly argumentative. You have the article in evidence and it is of no

(Testimony of Stephen Ward Gerber.)

consequence to the court what the views of the witness are. You don't have to go into any examination on this subject at all, because, in my opinion, the article in question is on its face highly scandalous and libelous and never should have been permitted to have been published in any magazine of any kind. It isn't going to do any good for us to take this up line by line, and ask the witness what his opinion is of what he wrote in the magazine. That is my job, to look at it and read it and decide it without the opinion of this witness.

Mr. Abrams: How is your Honor going to figure damages? Let's assume everything that happened is in and you have to sit down and find out how much——

The Court: I don't see anything you are asking has anything to do with that.

Mr. Abrams: If this man showed wanton, reckless, wilful disregard of the rights of Mr. Molesworth so that pecuniary damages should be awarded by this Court, this examination is material as showing the reckless, wanton, wilful disregard of Mr. Molesworth's rights.

The Court: You don't have to argue that because on the [114] face of the article, in the absence of any showing by the defendant as yet, I would be prepared to hold that that article constituted exemplary damages.

Mr. Abrams: All right.

The Court: That is, of course, on the face of the matter as it appears before the Court in the article.

(Testimony of Stephen Ward Gerber.)

Mr. Abrams: All right, I will stop, your Honor, right here.

The Court: It may be that the defense can present evidence that would show that the plaintiff in this case is the type of person against whom such language would be fully justified. That would be a matter of defense. [115]

* * *

Mr. Bloom: The sale price is stated in that advertisement.

The Court: Ask him the question.

Mr. Abrams: I was trying to avoid too much interrogation by simply putting in an exhibit that was already marked without objection the other day.

The Court: Do you object to it?

Mr. Giometti: I don't see the purpose.

The Court: What is it?

Mr. Abrams: It says, "$23,500. At this price this property is a 'steal'."

The Court: Is that the price you put on the property in the advertisement?

A. Yes. That is not what I sold it for, that is the advertised price. [119]

* * *

The Court: I am inclined to believe those advertisements [121] are not competent in this case for any purpose that I can see. You may have them marked for identification.

Mr. Abrams: I may that, Your Honor. We will save our rights to the exclusion.

(Testimony of Stephen Ward Gerber.)

(Documents were thereupon marked Plaintiff's Exhibits Nos. 16 and 17 for identification.)

Q. (By Mr. Abrams): Now, Mr. Gerber, you sent this letter as part of the Borenstein correspondence, part of which has been introduced by your attorney, did you not, under date——

Mr. Arguello: Can I see the letter, counsel?

Mr. Abrams: I wish you wouldn't interrupt until we get through asking this, at least.

Mr. Arguello: It is the practice in this jurisdiction to show the letter to the attorney for the opposition before presenting it to the witness.

Mr. Bloom: We have shown that to you. We will be happy to show it again.

Mr. Arguello: I have no way of knowing what it is you are referring to.

Mr. Abrams: No use showing it to the attorney unless it is identified as having been sent by him.

Q. Was this sent by you, this piece of paper here?

A. That is a very small part of a letter that I sent.

Q. I didn't ask you that, did I, sir?

A. You asked me whether this was a letter. I said it was part. [122]

Q. I said, was this paper—I used the word paper—was this a paper you sent to Mr. Borenstein? A. Not alone, no; not by itself.

Q. Well, you sent that paper, did you not?

A. With additional. This is part of a letter I sent Mr. Borenstein. Not a letter.

(Testimony of Stephen Ward Gerber.)

The Court: All right. That answers the question.

Q. Mr. Borenstein only sent us what pertained to Molesworth.

Mr. Arguello: I ask that that go out.

The Court: The witness just said it was part of a letter.

Mr. Abrams: He is talking about another matter. Read it and you will see. Read it, although you have read it before, I understand. I am now offering this, Your Honor, at least that portion that applies to the plaintiff Molesworth's case.

Mr. Arguello: Outside of the fact that the record showed this was only a portion of the record——

Mr. Abrams: Yes, and the last paragraph is about another person entirely.

(The document referred to was marked Plaintiff's Exhibit No. 18 and received in evidence.)

Mr. Abrams: This letter, Your Honor, is dated February 20, 1949, and reads—if Your Honor recalls, the letter was introduced, subsequent to this, by Mr. Molesworth to Mr. Borenstein, and this is from the defendant to Mr. Borenstein.

(Reading Plaintiff's Exhibit 18.) [123]

That is where that sheet ends.

Q. Now, Mr. Gerber, at the time you wrote this letter about wearing a uniform illegally in violation of regulations, you knew a man in the navy on ter-

(Testimony of Stephen Ward Gerber.)

minal leave had a right to wear a uniform, didn't you?

Mr. Arguello: I object to that.

A. I do not. I know no such thing. I will answer him.

* * *

Q. (By Mr. Abrams): After writing this to Larry Borenstein—he was an associate editor of yours on the Weekly Philatelic Gossip, wasn't he?

A. If you will tell me what you are trying to infer by "associate editor," I will be glad to answer. An associate editor does not get paid. Everybody that ever wrote for Gossip is an associate editor. He is a staff dealer. I never met the man in my life.

Q. What is his position? [124]

A. No position. He is a staff dealer. About two or three times a year he would write a small article.

Q. He was a contributor?

A. Yes, but no pay.

The Court: He was a contributor who did not get paid for his articles?

A. Correct.

Q. (By Mr. Abrams): His name appears in the publication, though, as an associate, doesn't it?

A. With about twenty others.

The Court: That answers the question. He is an associate editor, whatever that means.

Mr. Abrams: Yes.

(Testimony of Stephen Ward Gerber.)

Q. However, you wrote Mr. Borenstein you were going to "take another swipe at him" and "he will get his brains beaten out?" You wrote that, that you were going to take another swipe at him, didn't you? A. Yes.

Q. And you knew that "this kid" you refer to in this letter as "this kid," you knew that he was only 22 years old at the time you were going to beat his brains out?

A. I wrote that after—just prior to my writing that letter—that letter consisted of three pages. There is another full page on Molesworth, and I will stand on what I said there.

Q. Will you produce the other, if you have the other page now, [125] please?

A. The three pages went to New Orleans to Mr. Borenstein. I can't produce what was sent to him.

Q. Have you got a copy of it?

A. No, I haven't.

* * *

FRANK SANKEY

called on behalf of the defendant; sworn.

* * *

Direct Examination

By Mr. Arguello:

Q. What is your occupation, Mr. Sankey? [126]

A. I am a stamp dealer, postage stamps, and stamp collector.

* * *

(Testimony of Frank Sankey.)

Q. Are you familiar, Mr. Sankey, with the method of selling stamps by dealers and by auctioneers in the stamp world? A. I think so.

Q. Can you tell us how a stamp auction is conducted, Mr. Sankey?

A. Well, that is out of our line of business. I don't know if I can give you an adequate description. People merely bid on stamps. They are offered in lots and the values are put down, the approximate values, catalogue values. People bid on them whatever they think the stamp is worth. The stamp is described in the auction catalogue.

* * *

Q. (By Mr. Arguello): Mr. Sankey, in the operation of the stamp business are there any surveys or tests—withdraw that. In the operation of the stamp business, the United States Stamp Company, are you aware of any change in the volume of business in the stamp business in the last two years?

A. Rather acutely so, yes.

Mr. Abrams: Plaintiff objects to the question.

The Court: Why don't you lay a little more foundation as to the extent of his business, nature, and so forth? [136]

Mr. Arguello: Very well.

Q. In the sale of stamps by the United States Stamp Company, Mr. Sankey, do you sell stamps on a nationwide basis? A. That is right.

Q. Do you sell stamps in the Eastern part of the United States? A. Yes, we do.

(Testimony of Frank Sankey.)

Q. And in the United States possessions?

A. Yes.

Q. As a matter of fact, worldwide?

A. All over the world, yes.

Q. In the operation of that worldwide stamp business have you noticed a change in the volume of your business in the last two years?

Mr. Bloom: If your Honor please, I will object. I believe that the question is incompetent, and irrelevant, namely, what has happened to this gentleman's business.

The Court: Of course, that may go more to the weight of his testimony, and also may be only preliminary.

Mr. Bloom: Perhaps it is just preliminary, I don't know, but his particular experience would have no particular bearing on the general history of the trade.

The Court: Are there any trade journals that set forth the volume of business to ascertain whether or not the volume goes up or down?

The Witness: It is probably commented on, but there are [137] no authentic statistics.

The Court: There is no trade publication that publishes statistics on it?

The Witness: No.

The Court: So whatever statement you might make of the condition of the business would be based on your experience and discussions with other dealers?

(Testimony of Frank Sankey.)

The Witness: Yes, but I think it would be fairly accurate, a fairly accurate idea of values as of today.

The Court: How large a business have you, I mean as compared with others?

The Witness: I suspect we have the largest business on the West Coast by far. I am one of the largest businesses outside of New York or Boston.

The Court: Where is your business?

The Witness: On Brush Street.

The Court: Is that near the Russ Building?

The Witness: Yes, right near.

The Court: Overrule the objection. You may answer.

Q. (By Mr. Arguello): You have noticed a change in the volume of sales in the stamp business?

A. Yes, sir.

Q. What is that change, Mr. Sankey?

A. Well, there has been a gradual decline, more markedly this last six months, but it has been gradual for the last two years. [138]

Q. In comparison to, and taking 1948 as 100 per cent, what percentage do you think 1949, based on the first seven months of 1949, what percentage it would have dropped off.

Mr. Bloom: May it be understood the plaintiff's objection runs to this entire line of questioning, your Honor?

The Court: Yes.

Mr. Bloom: I haven't quite got it clear yet whether the witness is talking about one branch of

(Testimony of Frank Sankey.)

this business, the dealers' end, or if he is also talking about auctioneering and other phases.

The Court: I assume you are referring to the volume of business transacted by you and other similar dealers engaged in the business of selling stamps generally?

The Witness: Yes, that is right.

Q. (By Mr. Arguello): Can you answer the question? What is the percentage?

The Court: What is the percentage of drop this years as against 1948, isn't that the question?

Mr. Arguello: That is right, your Honor.

A. I would say 10 to 20 per cent. It varies from different groups and countries.

Q. 10 to 20 per cent? In the United States particularly?

A. Less in United States stamps than in the foreign stamps, but the drop-off has been marked throughout.

Q. Now, Mr. Sankey, how many large stamp auction houses are [139] there in the United States actively engaged in the business of selling stamps?

A. I don't know the number. There are many. There are hundreds of them. New York is alive with auction houses.

Q. Do you have any idea how many stamp auctions were conducted last year?

A. I haven't, no.

Q. Could you make any estimate?

A. I wouldn't want to hazard a guess. I would rather not.

(Testimony of Frank Sankey.)

Q. Are you familiar with the Ohlman Galleries in New York? A. I know of them, yes.

Q. Are they a large stamp house?

A. They are considered fairly large.

Mr. Arguello: I think that is all. Just a moment.

Mr. Giometti: I have a question or two, your Honor, if you will permit.

Q. Mr. Sankey, are you familiar with the values of stamps, in other words, do you know the prices?

A. I think so.

Q. At the present time has been a change in the market price of stamps today as contrasted with 1948? A. Why, yes.

Q. What is that change, Mr. Sankey?

A. A drop in prices this year over last year.

Q. Can you tell us percentagewise approximately what that [140] drop is?

A. I mentioned I thought from 10 to 20 per cent.

Q. That is, the drop in price of stamps is from 10 to 20 per cent? A. Yes, in value.

Mr. Giometti: Thank you.

Cross-Examination

By Mr. Abrams:

Q. Did I understand your name is Sankey or Stankey? A. Sankey.

Q. Would you say, Mr. Sankey, that integrity is an important thing in the business of selling stamps?

(Testimony of Frank Sankey.)

A. I personally think it is an essential thing.

Q. Without confidence in the dealer, it is really impossible for the dealer to remain in business?

A. I would think so, yes. [141]

* * *

Q. The conditions of stamps are a prime factor in determining price? A. Yes.

Q. All right. So that in any event, with the difference in value so slight, $15 in the mint with the 478 more valuable than the 460, and with that a slight difference, $5.60, it would be silly for a dealer—and with a sale being made, a percentage of that catalog difference only, it would be silly, wouldn't it, from your knowledge of the stamp business as a dealer, for a dealer to try to palm it off on another?

A. I would think it would be. [143]

* * *

Q. (By Mr. Abrams): I see. You would say, then, that [144] whether a stamp is one thing or another is something that can be the subject matter of mistake? A. Well, certainly.

Q. Therefore, because in the common dealing in stamps mistakes can be made, you test every single stamp before you pay for it, don't you?

A. That is correct.

Q. And you have found in operating the business that that is something that just has to be done in order to make sure in dealing in stamps that no mistakes are made? A. That is right.

* * *

(Testimony of Frank Sankey.)

The Court: Mr. Sankey, let me ask you about this matter of verifying the authenticity and correctness or incorrectness of stamps. It is a technical matter from which you acquire knowledge as a result, I suppose, of many years of experience?

The Witness: I think so.

The Court: Is it true that there are differences of opinion arrived at as to what stamps are, what issue they are? [147]

The Witness: Well, there can be.

The Court: Do you find in your business and dealing with others that there are cases where there are mistakes made in identification?

The Witness: That can be, yes.

The Court: That does happen?

The Witness: Yes, it does.

The Court: Do the dealers as between themselves and their customers make adjustments?

The Witness: We always do if there is any error.

The Court: You find errors, do you, at times as they do in all businesses?

The Witness: That is right.

The Court: That is all.

Mr. Giometti: I have a question I would like to ask along the same line your Honor was asking about.

Q. You say there are mistakes made in stamps because it is technical. What about a situation where you have one stamp that is watermarked and one stamp that is not watermarked, such as we

(Testimony of Frank Sankey.)

have in the situation here where we have stamp No. 460 and stamp No. 478? What is the possibility of making a mistake when you are dealing with those two stamps?

A. Well, it could happen, but when you see the watermark here you assume it is a cheaper stamp, No. 460—478. If you can't see the watermark you assume it is the other. [148]

* * *

ALBERT HENRY

called for the defendant; sworn. [149]

The Court: State your name.

The Witness: Albert Henry.

Direct Examination

By Mr. Arguello:

Q. What is your occupation?

A. I am a dealer in postage stamps and collector.

Q. Where is your stamp business located?

A. In the Palace Hotel, San Francisco. [150]

* * *

Q. Did you ever have any dealings with Mr. Molesworth in the stamp business?

A. I had one deal.

Q. When was that?

A. Approximately two years ago, I think; around one and a half years, two years ago.

Q. What was the nature of that transaction?

(Testimony of Albert Henry.)

A. If I remember correctly, Mr. Molesworth bid at one of my auctions and he was fortunate enough to obtain two or three hundred dollars worth of merchandise.

Mr. Abrams: He was what, did you say? Fortunate?

The Witness: That is right. And he accepted the merchandise and he didn't like it after he got it and sent it back, the majority of it. I don't recall the exact figure. [155]

Q. (By Mr. Arguello): Just digressing a moment, I think when plaintiff bids in your auction, he bids by letter?

A. Yes, we have written bids sent in. We have a written bid sheet.

Q. Following that return of stamps did you take any action with regard to Mr. Molesworth's name on your lists?

A. That ended our auction business, so therefore we didn't have any opportunity to do that.

Q. Did you consider the return made by Mr. Molesworth in that specific instance unreasonable?

Mr. Bloom: I think that calls for an opinion and conclusion.

The Court: Sustained. I am not going to accept evidence as to the opinion of some person who had a transaction with the plaintiff here.

Mr. Arguello: It is a specific reference to an unreasonable return, your Honor.

The Court: My gracious! That is one of the things, in my opinion, that is a sad commentary

(Testimony of Albert Henry.)

on our American society today. Everybody condemns everybody else because they had some experience with them. I should think businessmen would be a little more cautious in that sort of thing. I don't think this gentleman, if he is engaged in business in San Francisco, is going to make a statement in a court of law concerning a man with whom he had one transaction and give his [156] opinion as to the business character of the man he is doing business with. He might find himself in the same boat.

Mr. Arguello: We are not asking him to testify about character.

The Court: Am I right in that, Mr. Henry?

The Witness: I have nothing to say about that anyway, Judge, his character. I know nothing about it.

Mr. Arguello: One of the statements alleged to be false is that the plaintiff made unreasonable returns.

The Court: How did this defendant columnist in this case find out about the transactions with you?

The Witness: He asked me about it. In fact, I told him about it. He asked me if I had ever had any dealings with Mr. Molesworth and I told him I just had one and that was all. That was how he found out about it.

Mr. Bloom: When did he ask you that?

The Witness: Gosh, that's six or eight months ago.

(Testimony of Albert Henry.)

The Court: Well, go ahead, counsel. [157]

* * *

Q. (By Mr. Giometti): Do you remember how long Mr. Molesworth kept the stamps [158] before he made the return?

A. That is the only thing I do remember. I think his returns irregular.

The Court: No, no. You should be cautious. You are a businessman. Don't make statements about other people and draw your own conclusions. You were just asked the question how long it was.

The Witness: Thirty days.

Q. (By Mr. Giometti): When you have an auction, what is the usual period of time in which people return, or may expect returns on their bids when they make a bid at a stamp auction?

Mr. Bloom: I object to that, being incompetent, irrelevant and immaterial as to what his customer may do.

Mr. Giometti: I don't think so.

The Court: I would think so. Had a man bought stamps from me in San Francisco, there would be a different time element than in Boston or Timbuctoo.

Q. (By Mr. Giometti): When you sent them back to Mr. Molesworth, how did you send them?

A. At that time I think we sent our stamps—I think I sent it airmail.

Q. Registered mail, special delivery, or just straight mail?

A. Quantities like that we would have sent regis-

(Testimony of Albert Henry.)

tered. I am guessing, but I think we would have sent it registered. [159]

* * *

Cross-Examination

By Mr. Abrams:

Q. You told the Court he didn't make the return for thirty days, didn't you?

A. That is right.

Q. I show you a check and I show you your invoice it covers. Is that yours?

A. Yes, sir, it is.

Q. Dated October 20, 1947, isn't it?

A. Yes.

Q. Signed with your signature. What is the date of this check that was sent to you from Boston?

Mr. Giometti: I can't see how the date of that check would be material. What bearing would it have, whether it was paid or not?

The Witness: I didn't say it wasn't paid. I said he didn't return it.

Q. (By Mr. Abrams): Oh, I see; you are distinguishing between them.

Mr. Arguello: May we have a ruling on the objection?

The Court: Overrule the objection.

Q. (By Mr. Abrams): The date of this check is November 3, 1947? A. That is right.

Q. The date of your invoice is October 20, 1947, right? A. That is right.

(Testimony of Albert Henry.)

Q. How many days would you say it took for this invoice to get to Boston?

A. Airmail, I don't know; two or three days, I suppose.

Q. Assuming it got to him October 23—I don't know whether that was a Sunday or not, but in any event, October 23, ten days later or less, he mailed you a check for the stamps?

Mr. Arguello: There is no showing on that. The date of the check wouldn't show when it was mailed.

Mr. Abrams: Look at the cancellation and you may get some idea when this man deposited it in San Francisco. Does your Honor see the "11/3" that is written on the back of the [163] invoice of what was returned and what was paid for?

Q. (By Mr. Abrams): Take a look at this, Mr. Henry, and tell the Court if you want to change your testimony he didn't make those returns for thirty days to you, but that he made them in ten days' time.

A. May I say that the check undoubtedly was in ten days' time. As I recall, the lots did not come back with the return.

Q. But when you got the check there you knew he was paying for a portion of what had been sold to him?

Mr. Arguello: Is there any showing that this check arrived in ten days, or are you assuming that to be the fact? Let's find out about that before you continue.

(Testimony of Albert Henry.)

The Clerk: 11/17/47 it went through the Boston bank.

Mr. Abrams: It came back to Boston after being deposited in California, because that is how the stamp got on the back of it from the Boston bank that paid.

The Court: Yes, the check got back to Boston November 11.

Mr. Abrams: After having traveled from Boston to California and back again and after it was deposited in the bank.

A. I didn't question Mr. Molesworth's payment of the merchandise.

Q. Were you trying to create the impression, the fact that you didn't get paid for thirty days, when you said he didn't make returns for thirty days? [164]

A. No, sir, return of merchandise, not money. I never questioned his money end of the transaction.

Q. At the time you took the stand you knew you had been paid in ten days, didn't you?

A. No, I did not.

Q. As a matter of fact, you wrote a letter of apology to Mr. Molesworth because the stamps had to be returned, didn't you?

A. I don't recall that.

Q. Haven't you been asked to check up on this transaction? A. No.

Q. Before you took the stand did you take out your records? A. No.

(Testimony of Albert Henry.)

Q. Did you check up to see why he returned the lots? A. Yes, I remember.

Q. Did you check any books or records, any writings or documents? A. No.

Q. Did you look through your file to find a copy of that letter you sent him in connection with it?

A. No, I didn't.

Mr. Abrams: I am offering this check and this invoice.

(The check and invoice were marked Plaintiff's Exhibit 19 in evidence.)

Mr. Abrams: I regret not knowing this witness was going to testify. We haven't got the letter referred to, but I have [165] evidence that such a letter was sent.

Q. Do you have your mail here in San Francisco—I mean, do you have that copy?

A. I have no record of any dealings with Mr. Molesworth at all.

The Court: Didn't you have some record when the merchandise was returned? Wouldn't the inventory show when this happened?

The Witness: The merchandise Mr. Molesworth returned, as I remember, was sold about two days later locally.

The Court: Then you would have a record of that sale?

The Witness: I would have an accumulative day's business, and that is all.

(Testimony of Albert Henry.)

Q. (By Mr. Abrams): That is, you wouldn't have any record it had been returned?

The Court: You said on direct examination that this—you started to tell me and I stopped you, that this transaction was irregular because it took thirty days. Now it appears that this all happened within ten or twelve days. What made you say it was thirty days?

The Witness: Judge, it was just recollection.

The Court: You may be mistaken about this?

The Witness: I could be mistaken as to the date the merchandise came back. Not his check. I didn't question the payment of the merchandise at all.

Q. (By Mr. Abrams): Wouldn't the back of this statement, Mr. Henry, show a check was sent back with the merchandise right away? Will you read that, please.

A. It is an assumption. It may have come back in a different envelope. I don't recall.

Q. Is it common for stamp people to pay postage on two different envelopes when they can use one?

A. I would say it is customary, yes.

Q. To use two different envelopes?

A. Usually mail the check, and the other is bulky.

Q. But one stamp can be $300. Why did you say it is customary?

Mr. Arguello: I object to this line of questioning.

The Court: That is argumentative. Sustain the objection.

(Testimony of Albert Henry.)

Q. (By Mr. Abrams): You see what is on the back there? Does that refresh your recollection that the lots were returned with the check?

A. I don't recall it being returned with the check. It may have been; I don't recall.

Mr. Abrams: They may have been. That is all.

The Court: Any further questions of this witness?

Mr. Bloom: No.

The Court: That is all. You may be excused. We will take a brief recess at this time.

(Recess.) [167]

STEPHEN WARD GERBER

resumed.

Cross-Examination

(Continued)

By Mr. Arguello:

Q. Mr. Gerber, you are interested in the collection of stamps, are you not? A. Yes, sir.

Q. How long have you collected stamps, Mr. Gerber? A. Over forty years.

Q. As a development of your interest in collecting stamps, at one time you operated a stamp business, did you not, Mr. Gerber? A. Yes, sir.

Q. What was the name of the business?

A. Well, National Stamp Company.

Q. How long did you operate that business?

A. About two years.

Q. As a result of that—withdraw that. Did you

(Testimony of Stephen Ward Gerber.)

at any time devote your whole time to the sale of stamps as a stamp dealer? A. No, sir.

Q. What is your regular occupation?

A. Salesman.

Q. By whom are you employed?

A. I am unemployed.

Q. By whom were you employed? [168]

A. I was last employed by an oil company in Philadelphia, Pennsylvania.

Mr. Abrams: Did you say when that was?

The Witness: I was employed there for sixteen years prior to October, 1947.

Q. (By Mr. Arguello): Mr. Gerber, in your interest in the collection of stamps have you belonged to stamp societies? A. Yes, sir.

Q. What stamp societies are you a member of?

A. I am a member of the American Stamp Dealers Association; American Philatelic Association; Society of Philatelic Americans; Bureau Issues Association; Palo Alto Stamp Club; Redwood City Stamp Club; Veterans Stamp Club; honorary member of the Omaha Stamp Club, and Trans-Mississippi Philatelic Society; honorary member of the Stamp Club, United States Naval Hospital, Mare Island; Veterans Hospital, Staten Island; also Santa Margarita Farm in Oceanside, California; there may be others.

Q. As an interest work, in your stamp collection and dealing, have you written a column dealing with the stamp business? A. Yes, sir.

(Testimony of Stephen Ward Gerber.)

Q. That is the one that appears in the Weekly Philatelic Gossip? A. Yes, sir.

Q. As and for the writing of that column did you receive any consideration?

A. No consideration. No compensation whatsoever of any kind. [169]

* * *

Q. (By Mr. Arguello): What dealers did you talk to about Mr. Molesworth, Mr. Gerber?

A. Larry Borenstein of New Orleans; Herman Hurst, of New York; Max Ohlman of New York; Al Henry of San Francisco; Hy Bedrin of New York.

Q. Did you receive communications from those dealers? A. Yes, sir.

Mr. Abrams: I will have to object to this, your Honor.

The Court: May I see the letters, please.

Mr. Arguello: Will you state the ground of your objection, counsel.

The Court: I don't see why you object to this.

Mr. Abrams: My trouble is, it is hearsay piled on hearsay, your Honor.

The Court: That is not unfavorable to your side of the [172] case. However, use your own judgment.

Mr. Abrams: I would like to be fairly consistent, and I don't know what the next letter might be that might not be so favorable to my case. The man

(Testimony of Stephen Ward Gerber.)

asks in it that he doesn't want this mentioned, and so forth.

The Court: The man says in this letter that his returns have been fairly excessive and in some cases justified, and he says, "Very often I believe he buys stamps thinking he has a certain sale."

Mr. Abrams: I will defer to your Honor's judgment.

The Court: You may use your own judgment, but I think this is favorable to the plaintiff's contention.

Mr. Arguello: One of the items of alleged libel is the fact that he believes that these practices of selling stamps, when you secure them from an auctioneer for the purpose of submitting them to customers before returning them, is not an ethical practice.

The Court: I agree with you. I don't want you to think I am trying to take the case out of your hands, because I know you have been thinking about it in the preparation for the trial of the case with diligence. I can see that. What you say is true, but when you put in evidence a letter that the defendant received and in which the merest, the worst kind of hearsay is indulged in as evidence of the truth of statements which he printed, I think it would be better left [173] alone.

Mr. Arguello: There is only this point, in a libel case any material upon which the writer relied or used in part of his investigation, or any part thereof

(Testimony of Stephen Ward Gerber.)

of that knowledge he gained relative to the plaintiff, is material regardless of the fact that it might be hearsay.

Mr. Abrams: I withdraw my objection, Mr. Arguello. I don't think we need to argue it.

The Court: Perhaps I have said too much already in regard to this letter. You have offered it and the objection has been withdraw and I have read it, and the letter may be received.

(The letter was marked Defendant's Exhibit D in evidence.)

Mr. Arguello: This is the letter (handing to witness).

Mr. Bloom: You are referring to the letter of Mr. Ohlman, Mr. Arguello?

Mr. Arguello: That is correct.

Q. Now, you made inquiry of a Mr. M. Ohlman, is that correct? A. That is correct.

Q. Did you receive a reply from him?

A. Yes, sir.

Q. I will ask you to identify that letter. Is that the reply? A. Yes, sir.

Mr. Arguello: I will offer that in evidence as having a comment on Mr. Molesworth, as the defendant's next in order. [174]

The Clerk: May that be withdrawn from the deposition?

Mr. Abrams: It may, as far as I am concerned.

Mr. Arguello: Is there any objection to it?

(Testimony of Stephen Ward Gerber.)

Mr Abrams: No objection.

(The letter was marked Defendant's Exhibit E in evidence.)

The Court: Perhaps it would save time if I read it. You may take it from the deposition and mark it Exhibit E. [175]

* * *

Q. (By Mr. Arguello): Who else did you discuss this case with before your publication, Mr. Gerber? A. In addition to the letters?

Q. Yes.

A. Among the names I mentioned were Larry Borenstein and Herman Hurst.

Q. When did you have a conversation with Mr. Hurst?

A. I couldn't fix the exact date, but it was before the publication of the article. I couldn't fix the exact month or date.

Q. Approximately what date?

A. It would have to have been between May and October, 1948.

Q. What was the substance of that conversation? [179]

* * *

A. Mr. Hurst had come West on a trip, and he knew I was writing the column, and naturally discussing various phases of it, among which was Molesworth. I told him my experience with him and some of the stories I heard. The substance of the conversation, do you want?

(Testimony of Stephen Ward Gerber.)

Mr. Arguello: Yes.

The Court: What he told you.

Q. (By Mr. Arguello): What he told you.

A. Nothing derogatory except that that was the first time I found out Molesworth was young. He told me he was just a young fellow, a midshipman in the Naval Reserve, getting an education from—This is the story he gave me. I don't know the facts, but getting an education from the Navy and he was dealing in stamps on the side.

Mr. Abrams: The first two words—"nothing derogatory"?

The Witness: That is right, he told me nothing derogatory.

Q. (By Mr. Arguello): Did you discuss this matter with anybody else?

A. Larry Borenstein.

Q. What was the subject matter—I mean, the content—when was that conversation?

A. That was also in the same period of time.

Mr. Bloom: I assume this is admitted under the same rule?

The Court: Are you objecting to it? [180]

Mr. Abrams: No. There is a letter there with Borenstein, anyway.

Q. (By Mr. Arguello): What was the content of that discussion?

A. He told me that he had done business with Molesworth and I told him what the facts were that I had gathered from my own experience and

(Testimony of Stephen Ward Gerber.)

the knowledge of others. He told me he was an impetuous kid and that he had tried to sue a couple of people. In fact, he even wrote me a letter he was trying to get experience in business by suing people.

Q. Who wrote you a letter?

A. Mr.——

Mr. Abrams: Borenstein?

A. Borenstein.

Q. (By Mr. Arguello): Where is that letter?

A. I believe I have that letter.

Mr. Bloom: Have you got it in your possession?

Mr. Arguello: Are you conducting this examination?

Mr. Bloom: No, but he is testifying to a conversation and says he has a letter.

Mr. Arguello: You can ask him for it.

The Court: Let's not get excited.

A. He also told me on the telephone that he had written Molesworth about it, and that his information on Molesworth was such he convinced Molesworth that that was a very, very poor procedure to follow. [181]

* * *

Q. (By Mr. Arguello): Now, in July, 1949, a third article was written. I am calling your attention to that article wherein a letter was quoted. Did you have knowledge at the time that you wrote this column as to the existence and the receipt of Mr. Molesworth's letter in the office of the publisher?

(Testimony of Stephen Ward Gerber.)

A. Oh, no. You mean at the time, did I have knowledge of it [183] before I wrote the article?

Q. Yes.

A. Certainly. I quoted the letter in the article.

* * *

Q. (By Mr. Arguello): Now, any reference in the column you made to the 460 and 478 was based upon your personal knowledge in dealing with the defendant, is that correct? A. Yes, sir.

Q. And the statement you made relative to counterfeit was based upon your knowledge and observation of the letter written by the plaintiff——

A. Yes, sir, and his admission.

Q. ——about the sale of the stamps?

A. Yes, sir.

Q. The statement as to his methods in respect to returns—— [185] A. Were true.

Q. Don't anticipate me. Were based on your letters and conversations with the dealers?

A. And my personal experience.

Q. What was your personal experience of Mr. Molesworth, with Mr. Molesworth in regard to improper returns?

A. I submitted to him six lots of which—now, the figure may be technically wrong, but for the purpose of—I think they are correct—they are valued about $227. Out of those he returned over $200 worth and wrote a note along with it impeaching my integrity.

Mr. Bloom: Haven't we had all this before?

(Testimony of Stephen Ward Gerber.)

The Witness: It was my experience that permitted me to write this column. That is what I wrote about.

The Court: Isn't this a reference to exhibits already in evidence?

Mr. Bloom: And testified to.

The Court: Strike the answer. I don't want any comment of the witness on what is already in evidence.

Mr. Arguello: That is all I have with this witness at this time.

Redirect Examination

By Mr. Abrams:

Q. Mr. Gerber, just briefly, if I may, didn't you find out from Mr. Ohlman at the same time you got that letter that Mr. Molesworth was technically correct in making the [186] returns that he did? A. No.

Q. Before you published your letter?

A. No.

Q. And that never occurred that he notified you he was technically correct in making the returns?

Mr. Arguello: I object to the question. It is a reference to something not in evidence and, further, the deposition of Mr. Ohlman is here and will be introduced by the defendant.

Mr. Abrams: We have got a lot of noes, and you say it is not in evidence. Could I have that letter of Mr. Ohlman, because it is in evidence.

(Testimony of Stephen Ward Gerber.)

The Court: I thought I read it.

Mr. Abrams: Sure, in the letter.

Mr. Arguello: You are referring to another letter.

Mr. Abrams: No, I am referring to the letter his Honor read from Ohlman.

The Court: I read the letter.

Mr. Abrams: Now he denies he got the letter before——

The Witness: I made no denial. I am trusting to my memory and I am telling you to the best of my information and belief. I am not up here to lie on technicalities.

The Court: That is already in evidence. I don't understand the purpose of your reference.

Mr. Abrams: This is August 19, 1948, and the article [187] wasn't published until October 30, 1948.

The Court: You have that in evidence already. The fact you are trying to develop is in the letter.

Mr. Abrams: It wasn't for that purpose. I was trying to attack the credibility of this witness, which I submit has been successfully done. He was very fast to deny Mr. Ohlman told him he was technically right in those returns, and the letter itself said Mr. Molesworth was technically right in those returns.

The Court: Are you talking about something in the deposition?

Mr. Abrams: The question I just asked.

(Testimony of Stephen Ward Gerber.)

The Witness: Consider. Consider. You can't ask me whether I read a part of a certain sentence in there. I haven't read that letter in months. I don't recall any such comment. You are using the same tactics you used in the deposition until you got me into a heart attack. I am willing to answer your questions.

Mr. Arguello: I suggest you show the witness the letter you are referring to.

The Court: Go ahead. You have already covered that point.

Q. (By Mr. Abrams): When Mr. Molesworth asked you for a chance to give his side of the case you didn't give him that chance, did you? [188]

The Court: You have already asked him that question and he already answered that this morning, that he did not.

Mr. Abrams: I am sorry. [189]

* * *

Q. (By Mr. Abrams): Before taking the witness stand here today, or before having your deposition taken on Tuesday, have you inquired from Mr. Margolies in the past year whether he is still doing buiness with Mr. Molesworth?

A. Who is Mr. Margolies? Which one?

Q. Mr. Margolies is the gentleman in the Hobbs Stamp Company, and who put in some letter from the Hobbs Stamp.

A. Al Margolies? No, I had no further correspondence with him afterwards.

(Testimony of Stephen Ward Gerber.)

Q. After you got the information that was put in evidence here from these people, you made no attempt before publishing these articles on October 30 and subsequent months to get any other information that might show you you were wrong, did you?

A. After the article was published? Certainly not.

Q. That is, after the first article. After the first article and before you published the second article, you made no effort to find out whether you were wrong or not?

A. I still contend I am right. I say I am not wrong. I published facts. You say I am wrong.

The Court: You are always making speeches, like all the other columnists. The question didn't ask for that. If you will calm yourself and listen. He asked you—Read the question.

(Question read.)

A. I said I wasn't wrong. [190]

The Court: He asked if you made any effort to find out if you were wrong or not, that was the question, between the time you published the first article and the time you published the second article.

The Witness: No, sir.

The Court: And between the time you published the second article and the time you published the third article, you made no effort to find out whether you were wrong?

The Witness: Wrong in what, please? In the

(Testimony of Stephen Ward Gerber.)

third article I was absolutely right. I quoted a letter.

Q. (By Mr. Abrams): When Mr. Hurst told you nothing derogatory about this young man, this young fellow, did you think you should publish that in your column to take some of the sting out of what you had published about him, if you were acting in good faith as you were trying to tell the Court you were.

A. If you will refer—the answer to that is Yes. There is an article in Weekly Philatelic Gossip in which I print Molesworth's explanation of the substitution, of the misrepresentation of the stamps.

Q. Will you produce that article?

A. Yes, I think that is in the courtroom.

Q. On March 6, 1948—what is the date suit was brought? Suit was brought in this case in 1946.

Mr. Bloom: That is before the libel.

Mr. Abrams: Oh, I see. I am sorry; I was thinking of [191] 1949. What you are telling us is that after the substitution of 460 for 478 that we have heard about, you wrote on March 6, 1948, before you published the first article on October 30, 1948, the following: "Jack E. Molesworth of Boston points out that the culprit primarily responsible for selling a Scott No. 460 as No. 478 was a Boston auction house that apparently did not authenticate the stamps it offered in its sales."

I would like to offer this.

A. That was Molesworth's explanation and I published it in justice to him.

(Testimony of Stephen Ward Gerber.)

(A document was marked Plaintiff's Exhibit 20 in evidence.)

Q. (By Mr. Abrams): So that you knew, Mr. Gerber, before you published the libel in question that Mr. Molesworth, and you had put in your column, had made an explanation of the substitution of that stamp by a Boston auction house?

A. I don't consider it libel. I took into consideration what Mr. Molesworth told me and those subsequent facts that developed prompted me to write that article.

Q. So that even though you had before you, before you published the article, the facts involved in that auction——

A. I didn't say they were facts. I said that was his report.

Q. You had before you Mr. Molesworth's explanation at the time you published the statement on October 30?

A. Yes, that was taken into consideration. [192]

Q. And despite the fact that you had that explanation, which you considered good enough to print in your column in March, 1948, you went ahead with these statements?

A. The answer is perfectly simple. I think that answer is obvious. Certainly, I gave the man a chance to make his explanation, but I couldn't accept that as a valid excuse. When these other situations developed that culminated into a situa-

(Testimony of Stephen Ward Gerber.)

tion I thought was inimical, I published. Had that transaction only existed, there never would have been a word said. There were other breaches.

Q. Isn't it a fact that March, 1948, was before your own auction sale in May? A. I said so.

Q. And you got sore personally because of his return and his claim you had misdescribed the stamps, and you revived the whole business about 460 and 478 in your October 30 issue?

A. If you look at the October 30 issue you will see that is only one statement.

Q. At the time you published this article you had nothing against Jack Molesworth, I mean no animus against him? A. I have none today.

Q. But it is published in October, after you had your own personal controversy with him, didn't you?

A. And I also, as the testimony will show, had conducted an investigation and had found that the experience of many others [193] was the same as my own experience and opinion.

Q. Let's see. You say you have nothing against Mr. Molesworth today? A. Absolutely not.

Q. And have you in the past six months, we will say, taken the trouble to point out that the American Stamp Dealers Association upheld Mr. Molesworth on that thing you were libeling him about in your article on the return of $270 worth of stamps out of that $300?

Mr. Arguello: You are asking some details of a

(Testimony of Stephen Ward Gerber.)

matter not in evidence, of which we have no way—which I do not believe is material.

The Court: When did you say this occurred, this proceding before some organization?

Mr. Abrams: This occurred before the time of the publication of the first October 30 proceeding, your Honor. It is referred to, I think, in either the first or second—you will find something there. I have read it. $270 out of $300——

The Court: I understand that, but you said something about some meeting which approved the action.

Mr. Abrams: The American Stamp Dealers Association approved the action.

The Court: When did that occur?

Mr. Abrams: Let's have the date when that happened. [194]

The Court: I have to know the date in order to rule on the materiality.

Mr. Abrams: This is the Hy Bedrin. All right. Prior to December 31, 1948, your Honor, the action was taken by the American Stamp Dealers Association, because this letter is dated that, and without trying to get the contents in, it tells what the Board did in this letter.

Q. (By Mr. Abrams): You knew at the time you published——

Mr. Arguello: I object to any questions about that transaction. It isn't in evidence.

The Court: He can ask if the witness knew about this.

(Testimony of Stephen Ward Gerber.)

Q. (By Mr. Abrams): Did you know that, with regard to the transactions Mr. Molesworth had with Mr. Hy Bedrin, the American Stamp Dealers Association sustained Mr. Molesworth and sustained his rejection of the stamp in question?

A. It is utterly ridiculous, impossible for me to know. It is too far-fetched.

Q. The answer is that you didn't know about it?

A. I knew nothing about it, no intimation, no suspicion. I don't know why he is asking it.

The Court: Let's have in mind all this speech-making—The question is simple. Did you have any knowledge of this action of this Association of stamp dealers?

The Witness: No, sir.

The Court: You did not know about it? All right. [195]

Q. (By Mr. Abrams): That is how you want to leave your testimony with regard to what you were considering wrong about Mr. Molesworth, from that day to this you never heard anything from anybody about the action of the American Stamp Dealers Association?

A. I said that was so. I answered it.

Q. I want to make sure. You haven't heard?

A. I answered that. I said no, I haven't heard it, not by the slightest stretch of imagination. Wouldn't make any difference.

Q. It wouldn't make any difference what you heard about Mr. Molesworth?

(Testimony of Stephen Ward Gerber.)

A. No, for their dealings on the record. I have made them the object of discussion, too.

Q. Well, did you also indict a Lew Marsh Company? A. No.

Q. Stamp Aid Company?

A. I don't know them.

Q. Robert A. Siegel of New York?

A. Robert A. Siegel I will accept.

Q. Did you write him about Mr. Molesworth?

A. No. I couldn't write to all of them. There are probably 350 auction houses in the United States.

Q. Did you consider you were treating this young man fairly if you only wrote to two or three dealers out of 200 or 350 and then wrote this article? A. Absolutely.

Q. That was your state of mind, what you considered a fair deal?

A. Absolutely, just take a cross-section like a poll is taken. [198]

Q. Well, you don't mean that?

A. I don't know. I mean, you can't write to everyone. You could only take a cross-section.

Mr. Abrams: I am not going to take any more of this Court's time, your Honor.

The Court: Is that all with the witness?

Mr. Arguello: That is all.

The Court: That is all. You may step down. I want to ask you one question, if you will come back. I notice that a rather worthy purpose is stated in

(Testimony of Stephen Ward Gerber.)

the editorial page of your column and as to its purposes.

The Witness: Yes, sir.

The Court: To eliminate trickery and unfair dealings in the business.

The Witness: That is true, sir.

The Court: How would you possibly accomplish that by writing an anonymous article about——

The Witness: You mean the first article?

The Court: What possible good could you do the industry by writing an anonymous article that nobody would know who you were talking about?

The Witness: They correct their methods of doing business. They would change their ways of doing business and I wouldn't have to bother with them any more.

The Court: It is a lot of power, isn't it, for a man of [199] your standing in society to have to determine the standards of conduct of people engaged in this business? Well, I think that is all.

* * *

JACK E. MOLESWORTH

the plaintiff, recalled in rebuttal; previously sworn.

Direct Examination

By Mr. Abrams:

Q. Mr. Molesworth, in this Bedrin business, will you tell the Court what the transaction was?

A. The first transaction was a transaction wherein the total invoice value of the lots was $352.10.

(Testimony of Stephen Ward Gerber.)

A. What you are talking about. I don't know what you are talknig about. You didn't read me any proceedings.

Q. You want to tell the Court at the present time you have no feelings whatsoever against Mr. Molesworth, have you?

A. No animosity whatsoever.

Q. No animosity whatsoever? Now, you must have sent out inquiries to some of the leading stamp dealers with whom Mr. Molesworth does business before you published that article on October 30 of him, didn't you?

A. I answered that. I sent inquiries to certain stamp dealers.

Q. And the best you have been able to produce here in justification of what you have done is Ohlman and these others that you have mentioned, is that correct? [196]

A. Please permit me to repeat my answer that everything I wrote is true. I am still certain it is true.

Q. Please——

A. You are asking the same question over and over again, just phrasing it different for your purpose.

Q. Mr. Gerber, did you find out who the principal houses were in New York City and in Boston with whom Mr. Molesworth did his business before you wrote those articles in question?

(Testimony of Stephen Ward Gerber.)

A. No. I couldn't get them except from Mr. Molesworth.

Q. Did you ask Mr. Molesworth to tell you who he did business with before publishing those articles? A. I found no reason for it.

The Court: Well, you didn't do it?

A. No, sir.

Q. (By Mr. Abrams): Well, now, the Ohlman Galleries haven't run any auctions for a couple of years, have they?

A. Yes, sir, they ran one, a small auction, less than a year ago and retired from the auction business. Probably the most famous, well-beloved auctioneer in the business.

Q. Mr. Bedrin, whose letter you have put in, never brought to your attention anything about the action of the Stamp Dealers Association?

A. No.

Q. And did you inquire of some of these leading concerns like Harmer, Rooke & Co., Jack Morrison, Inc.? [197]

A. They are not my ideas of leading concerns. I have indictments against both of them.

Q. You have?

A. I have indictments of my own against both of them.

Q. You have indictments?

A. That is what I said, yes, sir. I indict both of them.

Q. You mean mentally?

(Testimony of Stephen Ward Gerber.)

A. No, for their dealings on the record. I have made them the object of discussion, too.

Q. Well, did you also indict a Lew Marsh Company? A. No.

Q. Stamp Aid Company?

A. I don't know them.

Q. Robert A. Siegel of New York?

A. Robert A. Siegel I will accept.

Q. Did you write him about Mr. Molesworth?

A. No. I couldn't write to all of them. There are probably 350 auction houses in the United States.

Q. Did you consider you were treating this young man fairly if you only wrote to two or three dealers out of 200 or 350 and then wrote this article? A. Absolutely.

Q. That was your state of mind, what you considered a fair deal?

A. Absolutely, just take a cross-section like a poll is taken. [198]

Q. Well, you don't mean that?

A. I don't know. I mean, you can't write to everyone. You could only take a cross-section.

Mr. Abrams: I am not going to take any more of this Court's time, your Honor.

The Court: Is that all with the witness?

Mr. Arguello: That is all.

The Court: That is all. You may step down. I want to ask you one question, if you will come back. I notice that a rather worthy purpose is stated in

(Testimony of Stephen Ward Gerber.)

the editorial page of your column and as to its purposes.

The Witness: Yes, sir.

The Court: To eliminate trickery and unfair dealings in the business.

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The Witness: They correct their methods of doing business. They would change their ways of doing business and I wouldn't have to bother with them any more.

The Court: It is a lot of power, isn't it, for a man of [199] your standing in society to have to determine the standards of conduct of people engaged in this business? Well, I think that is all.

* * *

JACK E. MOLESWORTH

the plaintiff, recalled in rebuttal; previously sworn.

Direct Examination

By Mr. Abrams:

Q. Mr. Molesworth, in this Bedrin business, will you tell the Court what the transaction was?

A. The first transaction was a transaction wherein the total invoice value of the lots was $352.10.

(Testimony of Jack E. Molesworth.)

Q. Yes.

A. The total $274.15 was returned for major defects, various undescribed defects in the stamp.

Q. Have you got your original sale that you marked at the time you got these lots from his auction?

A. I have this invoice, a subsequent transaction. I have not made specific note as to the consideration.

Q. After this transaction with Mr. Bedrin did you, in accordance with the practice at the time, deliver the stamp you got, together with the catalog, to the American Stamp Dealers Association?

A. Not on this one incident, no, because subsequently he apologized for this and I accepted it. I have it here.

Q. Something referred to in the deposition—I am not going to waste too much time—— [202]

Mr. Arguello: I object if it is something—some other transaction.

Mr. Abrams: I am talking about his testimony in this deposition.

Q. Did you have some dealings with him wherein you took the catalog and the stamp he sent you and handed them over to the American Stamp Dealers Association?

A. Yes, I did. His invoice in that is dated October 25, 1948.

Q. Is that the same Bedrin who testified in this deposition against you?

(Testimony of Jack E. Molesworth.)

A. That is the same man.

Q. As a result of that where you took the stamp to the American Stamp Dealers Association, were you notified that the American Stamp Dealers Association had sustained your statement, or your position?

Mr. Arguello: I object to that. It isn't material. It is general, calling for an opinion and conclusion of the witness. The statement isn't connected with the issues in this case, the details of some other transaction that took place between Mr. Molesworth and Mr. Bedrin, which other transaction has not been identified at all.

The Court: Counsel says you have offered the deposition of this witness in evidence, and the witness has testified, as I understand from counsel, as to transactions with [203] the plaintiff.

Mr. Bloom: That is correct.

Mr. Giometti: Well, if your Honor please, I think the point is the deposition states that Mr. Bedrin informed Mr. Gerber of something that took place with Mr. Molesworth. It is my position it is immaterial whether what he says was true or not. In other words, the important thing is, Did he so inform Mr. Gerber? That is what we are looking for.

The Court: But if the witness testified in that deposition which you have offered, in response to questions, as to transactions which he had with the plaintiff, that would go to the matter of the truth

(Testimony of Jack E. Molesworth.)

of the libel, alleged libel, and certainly the plaintiff has a right to take issue with that. I can't tell whether the testimony offered by this witness on the taking of the deposition by you had to do with the issue of truth or malice or any other issue in the cause. You testified and the other side has a right to controvert it. I don't know what the testimony would be.

Mr. Giometti: I ask the witness refer specifically to the place he is referring to.

Mr. Abrams: "Do you remember that he complained about it"—page 34—"he complained about it being grossly misdescribed? Do you remember that?

"A. Now I remember that, yes. In November, yes. Now, wait a minute—was it last year, in 1948?

"Q. Yes. [204]

"A. Yes. I remember that.

"Q. You do remember that? A. Yes.

"Q. Do you remember also that he returned them to the American Stamp Dealers Association?

"A. That's right. He did.

"Q. And he made a charge against you there?

"A. He did.

"Q. And is it a fact also that you were tried on that charge and found guilty? Isn't that so?

"A. I was not.

"Q. Is it not a fact that you were reprimanded by that Association?"

Then there is an objection. Further on he testi-

(Testimony of Jack E. Molesworth.)

fied that the stamp was what he claimed it was, and this man returns it, and it is on that basis I am rebutting that statement and showing the reason why this witness testified as he did. On direct examination he was asked, page 40:

"Do you have the date in your records when the last transaction was made with Mr. Molesworth?

"A. I would have to look it up.

"Q. If I told you that your invoice was dated October 25, 1948, would that refresh your recollection? A. It might be right.

"Q. And Mr. Molesworth returned the stamps with a letter [205] dated October 31, 1948, did he not? A. He did."

I call your Honor's attention to the fact that these dates are after the date of the first libel and the fact that Mr. Gerber testified he relied on what Mr. Bedrin told him, after he published the libel.

"A. He did.

"Q. When did he return them?

"A. He never returned them to me."

Standing alone, that might be serious.

"Q. Who did he return them to?

"A. To the American Stamp Dealers Association.

"Q. He sent them right to the American Stamp Dealers Association? A. That's right.

"Q. And they took the matter up with you?

"A. That's right.

"Q. And you got your stamps back from them?

(Testimony of Jack E. Molesworth.)

"A. Oh, sure, definitely.

"Q. Did you ever have any talks with Mr. Molesworth?

"A. I only met him once or twice. I never spoke to him."

Q. (By Mr. Abrams): Now, Mr. Molesworth, coming to Mr. Ohlman, how many transactions did did you have with Mr. Ohlman? A. Two.

Q. Two, in your entire experience? [206]

A. Yes.

Q. Will you get the exhibit there? You heard what Mr. Ohlman said, that you were technically correct in making the return?

The Court: That letter is in evidence. I read it.

Q. (By Mr. Abrams): Well, were you right in both? He has testified he was right in both.

A. Yes, I was definitely right in both. I have the dates of the transactions there.

Q. So that in both transactions you were definitely right in your transactions with Ohlman?

A. Definitely.

Q. What were the dates of those transactions?

A. The first one was approximately May 7, 1948. That was the date of his invoice. I paid for it, I think, on May 14, within seven days after date of the invoice. The second was on July 29, 1948, and I paid for it within two days of the invoice by check dated the 31st of July.

Q. With regard to Margolies, who testified here, what has been your experience with Margolies?

(Testimony of Jack E. Molesworth.)

A. Margolies operates both in M & S and Hobbs. I have bought quite a few from him at private sale from M & S and Hobbs. In his testimony there he mixes the two. When I bought at private sale our express understanding was any item could be returned any time. The terms were such, whenever I felt like [207] paying I paid.

Q. Do you still do business with him?

A. I still do business with him.

Q. Have you got a letter from him in court?

A. Yes, it is right there. There is a letter in court marked in court.

Q. It has been marked for identification?

A. Yes. He admits I still do business with him in the deposition.

Q. Then it is all right. "Whatever explanation Mr. Molesworth would make would be accepted without question." That is about all as far as the deposition is concerned.

A. I am mistaken about that. The letter I referred to was from Fox.

Q. But you have a letter which Mr. Bloom unsuccessfully attempted to get in evidence as to the people you were doing business with now.

A. I have letters from Mr. Margolies.

Mr. Arguello: I object to this.

Q. (By Mr. Abrams): Are you doing business with this man now?

A. A transaction is now pending between us as of this date. [208]

* * *

The Court: I don't think there would be much purpose for you to discuss the facts, because they are clear in my mind. I have already indicated, at the time plaintiff's case went in, how I felt about this case, and I think it probably would be better if you know about it now so that if there is anything you wish to clear up you will have an opportunity to do so. Of course, I could just tell you nothing and then you could blindly pursue a path of submitting anything you thought of, but I know when I was practicing law it was always helpful to me to know what I was up against. Even though I found I was up against something that was difficult, it was always stimulating to know as then it might make one work harder. [212]

Mr. Arguello, I think this is clearly a case on the facts where an example should be made, whether that should take the form of exemplary damages or the form of damages to the feelings, as counsel says might be done under the law of Massachusetts, which matter you gentleman can hereafter comment upon if you wish.

It is really rather a sad commentary upon the system we seem to have fallen into in America that men can set themselves up as supermen and gods because they assume the title of columnist, and proceed to tear down utterly, ruthlessly, the character of private citizens. It is completely abhorrent to me that a man may have the effrontery to assume himself the power which should be reserved to the angels, or at least on a mundane plane, to men who,

like judges, at least have objectivity, the power to ruthlessly and scandalously, to suit their own personal purpose and with complete arrogance, break down the character of fellow citizens. I think this is a horrible example of what we have fallen into, apparently, by allowing these men who call themselves columnists, on the sheerest hearsay, to satisfy personal peeves, and with the power that the pen gives them, to engage in the sort of scurrilous writing that is evident in this case.

I think this defendant is a dangerous man, and if I had the power I would incarcerate him, because there is no greater harm that can be done than by these scurrilous and scandalous [213] and arrogant attacks from the press by people of this kind upon citizens. "Such men are dangerous," as Shakespeare said.

Here is a young man twenty-two years old, just got out of the Navy, a mere youth, known to be a mere youth, and this man of forty years' experience, he says, in this business proceeds to tear him about with language that is amazing.

Well, I don't care to say any more about that. There is nothing much that can be done, I suppose, in the way of making retribution, except some kind of an award. But what an opportunity for a man of decency and character to have made amends for what was done here. But no, he wasn't going to listen to anything. He was ready to indict and the indictment came forth, and he wouldn't listen to any facts that this young man wanted to present.

He had assumed to himself the power to just change a man's whole course of life. I have read a lot of cases of libel and I never saw anything quite as bad as this. The character of the language, the utter arrogance of a man who sets himself up to be a judge of his fellow man, perhaps to ruin him by just a few words on some paper. It is unexplainable to me. [214]

* * *

CERTIFICATE OF REPORTER

I, Kenneth J. Peck, Official Reporter, certify that the foregoing pages are a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed December 29, 1949. [215A]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or a true and correct copy of an order entered on the minutes of this Court, in the above-entitled case, and that

they constitute the Record on Appeal herein, as designated by the parties, to wit:

Complaint for Libel.

Motion of Defendant Stephen W. Gerber to Dismiss.

Minute Order of April 4, 1949—Order Denying Motion to Dismiss Complaint.

Answer of Defendant.

Supplemental Complaint for Libel.

Answer of Defendant to Supplemental Complaint for Liability.

Notice of Intention to Introduce Evidence of Subsequent Libels.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Intention to Move for a New Trial and to Amend Findings of Fact and Conclusions of Law and Judgment.

Order Denying Motions and Taxing Costs.

Notice of Appeal to Circuit Court of Appeals Under Rule 73(b).

Designation of Record on Appeal.

Designation by Appellee of Additional Portions of Record.

Depositions of Max Ohlman, Arthur Margolies and Henry Bedrin, held in the United States Courthouse, Foley Square, New York, N. Y., on the 30th day of August, 1949, at 10:30 a.m. Filed September 2, 1949.

Reporter's Transcript for September 1 and 2, 1949. Filed December 29, 1949.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

Defendant's Exhibits Nos. A, B, C, D, E, F and G.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of March, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12492. United States Court of Appeals for the Ninth Circuit. Stephen W. Gerber, Appellant, vs. Jack E. Molesworth, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 7, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
Ninth Judicial Circuit
No. 12492

JACK E. MOLESWORTH,

Plaintiff,

vs.

STEPHEN W. GERBER,

Defendant.

APPELLANT'S STATEMENT OF POINTS FOR APPEAL AMENDED

Pursuant to Rule 19 of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, the Appellant sets forth below the points upon which he intends to rely on his appeal:

Point One: That plaintiff has failed to prove a cause of action against defendant, in that each of the statements alleged to be libellous and upon which the judgment was based, were, and are true; or if truth is not a complete defense that it is a bar to punitive damages.

Point Two: That the articles written by defendant were conditionally, or qualifiedly privileged, and that such privilege is a defense to this action.

Point Three: That the judgment was excessive.

Point Four: That findings of fact No. 6, 7, 8, 9, 10 and 12, and conclusions of law No. 1 and 2 are not supported by the evidence.

/s/ ARGUELLO & GIOMETTI,
Attorneys for Appellant.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

Defendant's Exhibits Nos. A, B, C, D, E, F and G.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of March, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12492. United States Court of Appeals for the Ninth Circuit. Stephen W. Gerber, Appellant, vs. Jack E. Molesworth, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 7, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
Ninth Judicial Circuit
No. 12492

JACK E. MOLESWORTH,

Plaintiff,

vs.

STEPHEN W. GERBER,

Defendant.

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Point Two: That the articles written by defendant were conditionally, or qualifiedly privileged, and that such privilege is a defense to this action.

Point Three: That the judgment was excessive.

Point Four: That findings of fact No. 6, 7, 8, 9, 10 and 12, and conclusions of law No. 1 and 2 are not supported by the evidence.

/s/ ARGUELLO & GIOMETTI,
Attorneys for Appellant.

In the United States District Court for the Northern District of California, Southern Division

No. 28610G

JACK E. MOLESWORTH,

Plaintiff,

vs.

STEPHEN W. GERBER,

Defendant.

APPELLANT'S DESIGNATION OF RECORD FOR APPEAL

Appellant designates the following portions of the record as material to his appeal

1. Plaintiff's complaint filed February 4, 1949.
2. Defendant's answer filed April 14, 1949.
3. Plaintiff's supplemental complaint filed July 5, 1949.
4. Defendant's answer to Supplemental Complaint filed July 26, 1949.
5. The following portions of the transcript of Evidence filed December 29, 1949.
   (a) Page 3 Line 9 to Page 3 Line 17.
   (b) Page 27 Line 26 to Page 33 Line 16.
   (c) Page 37 Line 15 to Page 38 Line 5.
   (d) Page 48 Line 15 to Page 49 Line 13.
   (e) Page 54 Line 19 to Page 58 Line 11.
   (f) Page 58 Line 24 to Page 64 Line 7.
   (g) Page 64 Line 11 to Page 70 Line 23.
   (h) Page 73 Line 6 to Page 73 Line 14.

(i) Page 75 Line 20 to Page 78 Line 14.
(j) Page 80 Line 15 to Page 82 Line 5.
(k) Page 90 Line 22 to Page 96 Line 23.
(l) Page 96 Line 25 to Page 98 Line 21.
(m) Page 108 Line 6 to Page 109 Line 25.
(n) Page 113 Line 20 to Page 115 Line 12.
(o) Page 136 Line 17 to Page 141 Line 6.
(p) Page 168 Line 4 to Page 169 Line 5.
(q) Page 169 Line 18 to Page 169 Line 25.
(r) Page 185 Line 15 to Page 186 Line 22.

6. The following exhibits

(a) Plaintiff's No. 1.
(b) Plaintiff's No. 2.
(c) Plaintiff's No. 7. (Only 1st page in brackets.)
(d) Plaintiff's No. 13.
(e) Plaintiff's No. 14.
(f) Defendant's Exhibit A.

7. Findings of Fact and Conclusions of Law filed November 23, 1949.

8. Judgment entered December 2, 1949.

/s/ ARGUELLO & GIOMETTI,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 17, 1950.

In The United States Circuit Court of Appeals
for the Ninth Circuit

No. 12492

JACK E. MOLESWORTH,

Appellee,

vs.

STEPHEN W. GERBER,

Appellant.

APPELLEE'S DESIGNATION OF RECORD ON APPEAL

To the Honorable, the above-entitled Court, and to the Clerk of said Court:

Appellee Jack E. Molesworth hereby designates the following additional parts of the record which he thinks material to the appeal herein:

(1) Notice of Intention to Introduce Evidence of Subsequent Libels, dated August 17, 1949, filed August 18, 1949.

(2) The following portions of the Reporter's Transcript of evidence filed December 29, 1949:

(a) Page 13 Line 5 through Page 13 Line 8.
(b) Page 14 Line 6 through Page 14 Line 25.
(c) Page 16 Line 4 through Page 16 Line 15.
(d) Page 16 Line 23 through Page 20 Line 17.
(e) Page 27 Line 6 through Page 27 Line 25.
(f) Page 33 Line 17 through Page 34 Line 3.
(g) Page 34 Line 23 through Page 35 Line 21.
(h) Page 36 Line 5 through Page 36 Line 23.
(i) Page 38 Line 6 through Page 39 Line 10.

(j) Page 39 Line 19 through Page 40 Line 3.
(k) Page 41 Line 11 through Page 41 Line 18.
(l) Page 41 Line 24 through Page 42 Line 5.
(m) Page 42 Line 23 through Page 43 Line 3.
(n) Page 46 Line 12 through Page 52 Line 11.
(o) Page 52 Line 25 through Page 53 Line 6.
(p) Page 53 Line 16 through Page 54 Line 2.
(q) Page 58 Line 12 through Page 58 Line 22.
(r) Page 64 Line 8 through Page 64 Line 10.
(s) Page 71 Line 24 through Page 73 Line 4.
(t) Page 88 Line 20 through Page 90 Line 20.
(u) Page 99 Line 24 through Page 102 Line 13.
(v) Page 103 Line 6 through Page 103 Line 16.
(w) Page 105 Line 3 through Page 106 Line 25.
(x) Page 107 Line 9 through Page 107 Line 14.
(y) Page 110 Line 18 through Page 112 Line 7.
(z) Page 119 Line 7 through Page 119 Line 20.
(aa) Page 121 Line 25 through Page 124 Line 7.
(bb) Page 124 Line 17 through Page 126 Line 5.
(cc) Page 126 Line 25 through Page 127 Line 1.
(dd) Page 127 Line 9 through Page 127 Line 19.
(ee) Page 141 Line 8 through Page 141 Line 16.
(ff) Page 143 Line 2 through Page 143 Line 12.
(gg) Page 144 Line 24 through Page 145 Line 11.
(hh) Page 147 Line 19 through Page 148 Line 13.
(ii) Page 150 Line 1 through Page 150 Line 7.
(jj) Page 155 Line 12 through Page 157 Line 18.
(kk) Page 158 Line 25 through Page 159 Line 24.
(ll) Page 162 Line 16 through Page 167 Line 25.
(mm) Page 169 Line 6 through Page 169 Line 17.
(nn) Page 172 Line 11 through Page 175 Line 7.
(oo) Page 179 Line 5 through Page 179 Line 17.

(pp) Page 180 Line 2 through Page 181 Line 25.
(qq) Page 183 Line 20 through Page 184 Line 3.
(rr) Page 186 Line 23 through Page 189 Line 3.
(ss) Page 190 Line 1 through Page 200 Line 3.
(tt) Page 202 Line 4 through Page 208 Line 21.
(uu) Page 212 Line 14 through Page 214 Line 20.

(3) The following exhibits:

(a) Plaintiff's No. 2.
(b) Plaintiff's No. 3.
(c) Plaintiff's No. 4.
(d) Plaintiff's No. 5.
(e) Plaintiff's No. 6.
(f) Plaintiff's No. 8.
(g) Plaintiff's No. 9.
(h) Plaintiff's No. 10.
(i) Plaintiff's No. 11.
(j) Plaintiff's No. 12.
(k) Plaintiff's No. 15.
(l) Plaintiff's No. 19.
(m) Plaintiff's No. 20.
(n) Defendant's Exhibit D.
(o) Defendant's Exhibit E.

(4) The depositions of Max Ohlman, Arthur Margolies, and Henry Bedrin, on file herein, and referred to in the Reporter's Transcript, page 201 line 9 through page 201 line 19.

/s/ LEONARD J. BLOOM,
/s/ M. S. HUBERMAN,
Attorneys for Appellee.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 27, 1950.

[Title of Circuit Court of Appeals and Cause.]

MOTION OF APPELLEE FOR TRANSMISSION OF EXHIBITS ON APPEAL IN ORIGINAL FORM

To the Honorable, the above-entitled Court:

Appellee Jack E. Molesworth hereby respectfully requests this Honorable Court for its consent and permission for the transmission as part of the record on appeal in the above action of the following exhibits and depositions in their original form and without printing:

(1) Plaintiff's Exhibits Nos. 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 15, 19 and 20;

(2) Defendant's Exhibits D and E;

(3) The depositions of Max Ohlman, Arthur Margolies, and Henry Bedrin, on file herein, and referred to in the Reporter's Transcript, page 201 line 9 through Page 201 line 19.

This motion is based on the fact that such consent and permission will promote the ends of justice in that the printing of the aforesaid matter would constitute an unnecessary and unreasonable burden on appellee Jack E. Molesworth, and on the further ground that the transmission of said matter in its original form will in no way impede this Honorable Court in the determination of the above appeal.

Attached hereto and made a part hereof is the Affidavit of Leonard J. Bloom, one of the attorneys

for appellee, setting forth the facts upon which this application is made.

/s/ LEONARD J. BLOOM,
/s/ M. S. HUBERMAN,
Attorneys for Appellee.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF LEONARD J. BLOOM IN SUPPORT OF MOTION OF APPELLEE FOR TRANSMISSION OF EXHIBITS ON APPEAL IN ORIGINAL FORM

State of California,
City and County of San Francisco—ss.

Leonard J. Bloom, being first duly sworn, deposes and says:

I am one of the attorneys for appellee Jack E. Molesworth and make this affidavit for and in his behalf. The facts herein stated are within my knowledge.

Pursuant to Rule 19 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, appellant has heretofore filed herein his designation of the portions of the record on appeal which he wishes printed. Said appellant has also filed an amended "Statement of Points for Appeal" which designates a variety of alleged grounds of appeal, including the alleged failure of the evidence to support six Findings of Fact and two Conclusions of Law. Despite this fact appellant desig-

nates in his "Designation of Record for Appeal" as material a very small part of the record before the lower Court. This has necessitated the designation as material by appellee of the greater part of the Reporter's Transcript and other portions of the record of the lower Court.

Appellee Jack E. Molesworth is a person of very modest financial circumstances and would find it extremely burdensome and difficult to advance all of the funds necessary for the printing of the portions of the record which he designates as material on this appeal.

A substantial saving could be effected in this respect by the transmission in their original form of the exhibits mentioned in paragraph (3) of Appellee's Designation of Record on Appeal and of the depositions mentioned in paragraph (4) of said Designation. Some of these exhibits are lengthy and contain much extraneous matter not directly material to the appeal. This is also true of the aforesaid depositions which were taken by appellant. For the purpose of this appeal specific reference could readily be made by the parties, if they so desire, to particular parts of these exhibits or depositions to substantiate argument on appeal, without the necessity of having the entire printed record thereof before the Court. In all probability this Honorable Court will have occasion to refer to a small part only of these exhibits or depositions.

The granting of the aforesaid request will be of substantial financial assistance to appellee Jack E.

Molesworth, who will be relieved thereby of the necessity of advancing the costs of the printing of the aforesaid material. In view of large amount of other matter from the Reporter's Transcript which must be printed on appeal, this saving is of particular importance to one in appellee's financial condition.

Respectfully requested,
/s/ LEONARD J. BLOOM.

Subscribed and sworn to before me this 27th day of March, 1950.

[Seal] /s/ [Indistinguishable],
Notary Public in and for the City and County of San Francisco, State of California.
My Commission Expires February 7, 1953.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WILLIAM HEALY,

/s/ WALTER POPE,
U. S. Circuit Judges.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 28, 1950.

In the United States District Court for the Northern District of California, Southern Division

No. 28610

JACK E. MOLESWORTH,

Plaintiff

vs.

STEPHEN W. GERBER,

Defendant.

ORDER DENYING MOTIONS AND TAXING COSTS

Judgment was heretofore entered in this cause in favor of the plaintiff and for his costs of suit. The Clerk has taxed the costs at a total of $320.56, the amount specified in the cost bill filed by the plaintiff.

The defendant has made, without argument, three motions: (1) for a new trial; (2) to amend the findings of fact, conclusions of law, and judgment; (3) to review the taxation of costs by the Clerk and strike from his order certain items allowed.

The motions for a new trial and to amend the findings of fact, conclusions of law, and judgment are denied. The $20 witness fee of Joseph B. Abrams, one of the plaintiff's attorneys of record, is ordered stricken from the cost bill.

Dated: January 17, 1950.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed January 17, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73(b)

Notice Is Hereby Given that Stephen W. Gerber, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Judicial Circuit, from the final judgment entered in this action on December 2, 1949, and from the Order Denying Motions and Taxing Costs entered in this action on January 18, 1950.

Dated: February 1, 1950.

/s/ ALEX L. ARGUELLO, for

/s/ ARGUELLO & GIOMETTI,
Attorneys for Appellant,
Stephen W. Gerber.

[Endorsed]: Filed February 2, 1950.

No. 12,492

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN W. GERBER,
Appellant,

vs.

JACK E. MOLESWORTH,
Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

ARGUELLO AND GIOMETTI,
369 Pine Street, San Francisco 4, California,
Attorneys for Appellant.

PETERS WELCH PRINTING CO., SAN FRANCISCO

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No. 12,492

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN W. GERBER,

Appellant,

vs.

JACK E. MOLESWORTH,

Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This action was instituted in the United States District Court for the Northern District of California, Southern Division. The jurisdiction of that Court was based on diversity of citizenship, under the provisions of Title 28, U. S. Code, Judiciary and Judicial Procedure, Sections 1331 and 1332. Appellant, defendant below, is a citizen and resident of the State of California. Appellee, plaintiff below, is a citizen of the State of Massachusetts. The amount involved is in excess of $3,000.00. The case was tried to the Court without a jury. The Court entered a judgment for the appellee. (Tr. 24.)

This Court has jurisdiction of the appeal under the provisions of Section 1291 of Title 28, U. S. Code, Judiciary and Judicial Procedure.

STATEMENT OF THE CASE.

Stephen W. Gerber was a columnist for the "Weekly Philatelic Gossip", a stamp magazine. (Tr. 115-116.) His column was called "Pets and Peeves." (Tr. 55.) He received no compensation for articles written by him. (Tr. 116.)

It was conceded by both parties to the proceeding before the Honorable District Court and in effect stipulated, that the "Weekly Philatelic Gossip" was sold and distributed throughout the United States to stamp dealers, auctioneers, and persons interested or engaged in the stamp business. (Tr. 26-27.)

In 1947, appellee, Jack E. Molesworth, was advertising stamps for sale to dealers in the United States. (Tr. 36-37.) In response to these advertisements, on October 31, 1947, appellant, Stephen W. Gerber, ordered a stamp, catalogue Number 478, from the appellee. (Tr. 37.) The appellee accepted the order and forwarded a stamp, supposedly a Number 478. Examination of the stamp revealed that it was not a 478 but rather a cheaper stamp catalogued as Number 460. (Tr. 60-61.) The stamp was thereupon returned to appellee. (Tr. 38.)

(NOTE): All page references are to printed Transcript of Record unless otherwise noted.

Subsequently appellant received communications from various stamp dealers that appellee had sold a counterfeit stamp (Tr. 122) and that appellee's returns to these dealers in various transactions were excessive and not justified. (Deposition of Arthur Margulies 22, 23; Deposition of M. Ohlman pp. 4-5, 6-7; Deposition of Hyman Bedrin p. 28; Defendant's Exhibit D; Defendant's Exhibit E, Tr. 122, 118, 119, 125, 126, 135.)

On October 30, 1948 an article written by appellant appeared in the "Weekly Philatelic Gossip". The text is as follows:

> "What's a Mole Worth? Actually nothing, unless you skin it. The mole is a darn nuisance that burrows blindly and aimlessly until trapped. The philatelic species runs true to form as a bore and a nuisance. Sometime ago, he slipped the trap by disclaiming responsibility for substituting No. 460 for 478 in a sale. He professes to be a 'Philatelic broker' who has apparently been carrying on his limited operations at the expense of the large stamp auction houses. Quoting from a few of the reports we learn that 'His returns have always been late and excessive * * *If he doesn't sell them, he returns the stamps.' Another report tells us that 'He practically returns about 90% of the lots and they have all taken him off their list. We are doing likewise.' Another auction house quotes their experience to the effect that the mole returned $270.00 from a total of $300.00 after holding the property between two and three months. He justified the delayed returns with the unreasonable claim that

the lots were not as described. From the information furnished to us it seems that he has operated at the auction houses' expense. He'd chisel on the lots by offering them for sale. If unsuccessful, they would eventually be returned, long after settlement date. This type of operation is a new and clever angle; as long as it can be carried on. But the gravy train is grinding to a stop and it's a painful fact that the mole's worth will have to be tested in a different racket—maybe going to work for a bank or something."

(Plaintiff's Exhibit "7".)

This article was the occasion for appellee's action for libel. A motion to dismiss was interposed to the complaint. It was denied and an answer was then filed. (Tr. 5-8.)

On March 5, 1949, another article written by appellant appeared in the "Weekly Philatelic Gossip". Its text is as follows:

"Gather Around, Dear Reader and enjoy the funniest story ever told. It furnishes proof positive that reporting stampic shenanigans is a risky vocation; especially, when a few gents are allergic to publicity. Pets and Peeves (October 30, 1948) published an item under the heading 'What's a Mole Worth?' Although no name was mentioned, a part-time Boston dealer named Jack E. Molesworth figured out that the shoe fit. So-o-o, said J.E.M. has filed a libel action against us for a paltry $150,000.00 to assuage his financial hurt as an upright, honest, unimpeachable and expert stamp dealer. (Don't laugh yet.) If selling a

counterfeit stamp, if misrepresenting a stamp cataloguing at $40.00 as being one catalogued at $55.00, if unreasonable demands and claims, if allegedly unsatisfactory auction settlements—if IF IF IF all of these are the distinguishing characteristics of an upright, honest, unimpeachable and well-informed stamp dealer, then we apologize. (Laughter, please.) We are reminded of one of several libel suits in recent years. A bozo sued Drew Pearson for libel. When the case was tried, Pearson proved the 'libel' and the bozo landed in the klink. When he saw the light, it was filtered through iron bars. We have two pertinent opinions, (1) this J.E.M. is being used as a tool to intimidate us in our fight for decency in philately, (2) this J.E.M. won't dare to bring the case to trial."

(Tr. 9-10.)

This article was the occasion for the filing of appellee's supplemental complaint for libel.

The answers filed on behalf of appellant are substantially the same. Each answer admits the authorship of the articles but denies that they are false or defamatory or that they exposed the appellee to hatred, ridicule or obloquy or that they injured appellee in his occupation as a philatelic broker and stamp dealer. Both answers deny that appellant knew or had reason to believe them false or that the articles were written with the intention to injure the appellee.

QUESTIONS RAISED ON APPEAL.

Three questions raised on this appeal are:

1. Did the trial Court err in finding as a fact that each publication exposed appellee to hatred, contempt, ridicule and obloquy and that each had a tendency to and did injure him in his business and occupation of a stamp dealer?

2. Did the trial Court err in finding as a fact that each publication was false?

3. Did the trial Court award excessive damages?

Appellee respectfully submits that each and every one of these questions must be answered affirmatively and the decision of the trial Court should be reversed.

SPECIFICATION OF ERRORS.

1. Where a libelous article does not refer to a plaintiff by name, the plaintiff must prove that at least one third person understood that it referred to the plaintiff. The article of October 30, 1948 does not refer to plaintiff by name and no proof was offered to show that any third person understood that it referred to plaintiff. Therefore, the District Court erred in awarding damages based on this article.

2. The evidence does not support the findings that the articles published in the October 30, 1948 issue and March 5, 1949 issue were false.

3. The damages awarded by the Court were excessive.

ARGUMENT.

I.

TO RECOVER FOR A LIBELOUS PUBLICATION IT MUST APPEAR NOT ONLY THAT IT WAS WRITTEN OF AND CONCERNING PLAINTIFF, BUT ALSO THAT IT WAS SO UNDERSTOOD BY SOME THIRD PERSON.

Where a libel omits the name of the person to whom it applies it is necessary for the plaintiff to show that a third person understood that it was the plaintiff who was referred to.

In *Harris v. Zannone,* 93 C. 59, 28 P. 845, the Court states:

> "Whether those who heard the words understood that they had reference to the plaintiff is one of the extrinsic facts by which the application of the defamatory matter to the plaintiff, if controverted, must be established on the trial, but need not be alleged. Their application to the plaintiff is to be established by proof."

In *DeWitt v. Wright,* 57 Cal. 576, the same principle was enunciated:

> "That the matter therein stated is libelous per se, is not disputed. But to enable the plaintiff to maintain an action on it, it is essential not only that it should have been written concerning the plaintiff, but also that it was so understood by at least some one third person."

To the same effect are *National Refining Company v. Benzo Gas Motor Fuel Company,* 20 F. (2d) 763; *Russell v. Kelly,* 44 Cal. 641; *Hearne v. De-Young,* 119 Cal. 679, 52 P. 150; *Dewing v. Blodgett,* 124 Cal. App. 100, 11 P. (2d) 1105; 53 C.J.S. 52 and 53.

"The burden is on the plaintiff to prove that the defamatory imputation referred to him and that it was so understood by others."

Vedovi v. Watson and Taylor, 140 Cal. App. 80, 285 P. 418;

53 *C.J.S.* 315.

"The general rules as to weight and sufficiency of evidence have been applied to evidence to show that the defamatory matter referred to plaintiff. Where it does not appear on the face of the publication that plaintiff was referred to, a preponderance of evidence must be produced to establish that readers generally would understand that the reference was to plaintiff."

Wright v. RKO Radio Pictures (D.C. Mass.), 55 Fed. Supp. 639.

This is also the view of the Restatement of the Law of Torts:

"If the applicability of the defamatory matter to the plaintiff depends upon extrinsic circumstances, it must appear that some person who saw or read it was familiar with the circumstances and reasonably believed that it referred to the plaintiff."

Rest. of Torts, sec. 564.

To satisfy the burden of proof on publication, it is necessary that the plaintiff show not only that the defendant spoke or wrote or otherwise prepared the defamatory matter or made it available to a third person, but also that the third person understood the significance thereof.

"Not only must the plaintiff prove the publication of the defamatory matter, but he must prove that it was published of and concerning him, that is, he must satisfy the Court that it was understood as intended to refer to himself and must convince the jury that it was so understood."

Rest. of Torts, sec. 613 (d).

It is immediately apparent that the article of October 30, 1948 does not refer to the plaintiff by name. (Plaintiff's Exhibit 7.) The Honorable District Court in the trial of the case conceded that this was an anonymous article which did not identify any person.

"The Court. That is all. You may step down. I want to ask you one question, if you will come back. I notice that a rather worthy purpose is stated in the editorial page of your column and as to its purposes.

The Witness. Yes, sir.

The Court. To eliminate trickery and unfair dealings in the business?

The Witness. That is true, sir.

The Court. How would you possibly accomplish that by writing an anonymous article about——

The Witness. You mean the first article?

The Court. What possible good could you do the industry by writing an anonymous article that nobody would know who you were talking about?

The Witness. They correct their methods of doing business. They would change their ways of doing business and I wouldn't have to bother with them any more."

(Tr. 135.)

Since the plaintiff is not described or identified on the face of the article it was incumbent upon him to prove that some third person understood that he was the party referred to.

That fact must be proved by substantial evidence. *Memphis Commercial Appeal, Inc. v. Johnson,* 96 F. (2d) 672. This the plaintiff failed to do. There is not a word in the record that indicates that any person knew that the article of October 30, 1948, referred to plaintiff. On but one occasion did plaintiff attempt to show that any person understood that the article of October 30, 1948, referred to him. On the direct examination of the witness Joseph B. Abrams, Esq., the following testimony was elicited:

> "Q. You are familiar with the two articles which are the subject matter of this action?
>
> A. Yes, sir.
>
> Q. In your dealings in the stamp fraternity since the publication of those articles, have those articles been the subject matter of discussion in the fraternity?
>
> A. They have.
>
> Q. Where have you discussed, or where have these articles been called to your attention, if any place?
>
> A. At dealers' offices in Boston, and at the stamp convention that was held in Boston about three weeks ago.
>
> Q. What type or branch of the business, members belonging to what branch?
>
> A. Both collectors and dealers have discussed the Molesworth articles, as well as this case. They have created a great deal of comment and talk in the field. In fact, it has almost become a 'cause

> celebre' if you will pardon the French, Your Honor."
>
> (Tr. 32.)

On its face this testimony does not establish even by innuendo that there was knowledge in any third person that the article of October 30, 1948, referred to appellee.

That the plaintiff knew that he was the subject of the article or that defendant intended to write of the plaintiff is not sufficient to establish damages.

In *Northrop v. Tibbles,* 215 F. 99, 131, C.C.A. 407, the Court in commenting upon this point stated:

> "Since the gist of an action for libel is damage to plaintiff's reputation, it is insufficient that plaintiff knew that he was the subject of the article, or that defendants knew of whom they were writing, but it must appear that third persons must have reasonably understood that the article was written of and concerning plaintiff, and that the libelous expressions referred to him."

Inasmuch as there was no evidence to prove that any third person understood that the article of October 30, 1948, referred to the appellee the trial Court's finding that that article injured him in his reputation or occupation was erroneous. The conclusion of law made by the trial Court that appellee was damaged was based on the finding that appellee was injured by both of these articles. Since the appellee did not prove that the article of October 30, 1948 was understood by one third person to refer to him the conclusion is erroneous.

II.

THE TRIAL COURT'S FINDING OF FACT THAT EACH ARTICLE WAS FALSE IS NOT SUPPORTED BY THE EVIDENCE.

The libelous character of the articles which constitute the subject matter of this suit centers about three accusations. They are:

1. That a stamp catalogued as a number 460 was sold for a stamp catalogued as a number 478;

2. That a counterfeit stamp was sold; and

3. That appellee made late and excessive returns.

The Court found that the articles were false. This finding is not supported by the evidence.

Appellee sold a Number 460 stamp for a Number 478 stamp. The catalogue price of a number 478 is $55.00, while the catalogue price of a Number 460 is $40.00. (Tr. 52.)

On cross-examination appellee testified:

"Q. At the time and skipping all this preliminary questioning, Your Honor, with regard to when these two people met, in the interest of time, and getting to the sale of 460 and 478, how are those stamps distinguished, Mr. Molesworth?

A. The stamps are distinguished by the watermark, the absence in one case and the watermark being there in the other case.

Q. When you sold a stamp of a type that has but one distinguishing characteristic, in the conduct of your business were you, or did you, usually make a check——

A. Very definitely.

Q. —as to the characteristic?

A. Very definitely.

Q. I see. Did you make a check in this instance?

A. I believe after purchasing at auction I did, because that is my customary procedure.

Q. However, the stamp went out and was not the stamp you represented it to be, is that correct?

A. That fact is not definitely established, but an expert has stated that in his opinion, it was 460 and not 478 as it was sent out.

Q. So far as you know, the stamp was not the stamp you represented it to be, is that correct?

A. That is correct.

Q. Now, you sold the stamp to Mr. Gerber for a profit?

A. Yes.

Q. You were holding yourself out as a stamp dealer at the time?

A. Yes, I was."

(Tr. 60-61.)

Appellee further testified that a watermark test is the only means of distinguishing these two stamps.

"Q. Will you look at these stamps and tell me what they are?

A. How do you mean, what they are? What catalog number?

Q. Yes.

A. That would be either 460 or 478, depending on the watermark. Both perforate 10.

Q. Can you tell from looking at those which is which?

A. No, they would have to be watermarked."

(Tr. 80-81.)

Appellee testified on direct examination that he never did see a watermark on the stamp sold by him to the appellant.

"Q. You have the 478 in question with you, or don't you?

A. No, I don't have. That stamp was returned to the auctioneer and refund was made.

Q. Would it be easy or difficult to determine whether that stamp is watermarked?

A. It would depend on where the stamp was in the set. The catalog will show this particular stamp was very difficult to determine the watermark, and in fact, I myself never did see a watermark on it."

(Tr. 76.)

Mr. Sankey, a stamp dealer, testified that where a more expensive stamp is distinguishable from a cheaper stamp solely by the presence of a watermark, and where the watermark cannot be seen, it is assumed to be the cheaper stamp and is sold as such. (Tr. 104-105.)

Appellee sold a stamp with a counterfeit cancellation as stated in the articles of October 30 and March 5th. This was not controverted. (Tr. 77-79; 53.)

Not only did appellee sell a counterfeit stamp but it was sold by him without adequately checking it for authenticity. His testimony is as follows:

"Q. Before the sale of that stamp, did you check it?

A. Yes, I checked it.

Q. How did you check it?

A. I checked it by reference to Scott's U.S. Specialized Catalogue. In that catalogue under 'Confederate Stamps' you will find cancellation imprinted on the page.

Q. Did you feel you had adequate reference material to properly check this stamp at the time you checked it?

A. There is reference material which would have been of value which I did not have.

Q. But you felt at the time that you checked it——

A. May I explain my location at the time this came about? I was on an island in a lake in New Hampshire at the time this came about. Reference material was not readily available.

Q. You were carrying on your business as a stamp dealer, though?

A. That is correct.

Q. Holding yourself out as a stamp dealer?

A. I did and still do."

(Tr. 63-4.)

As to the third charge that the appellee made late and excessive returns, these statements are not libelous and the Court did not consider them so. (Tr. 70.)

It is a well recognized principle of law that proof of the truth of the defamatory charge is a complete defense to civil liability.

16 *Cal. Jur.* 60.

It is not necessary in proving truth as a defense that a defendant prove the literal truth of an allegedly libelous accusation in every detail so long as the imputation is substantially true so as to justify the "gist" or "sting" of the remark.

Dethlefsen v. Stull, 86 C. A. (2d) 499, 195 P. (2d) 56;

Emde v. San Joaquin Central Labor Council, 23 C. (2d) 146, 143 P. (2d) 20, 150 A.L.R. 916.

Nor is the defendant required to justify every word of the defamatory matter, it is sufficient if the "gist" or "sting" of it is justified. Immaterial variances and defects of proof upon minor matters are to be disregarded if the substance of the charge be met.

Tingley v. Times-Mirror Co., 151 C. 1, 89 P. 1097;

Skrocki v. Stall, 14 C.A. 1, 110 P. 957;

Prosser on Torts, Sec. 95, p. 855;

Paris v. N. Y. Times Co., 9 N.Y.S. (2d) 690.

The trend as established by modern cases has been to liberalize the application of this rule, rather than restrict it.

Hearne v. DeYoung, 119 C. 670, 64 P. 576.

In applying these principles of law to the factual situation it is apparent that appellant, not only proved the "gist" of the charge, but the truth of the charge in its entirety.

It was definitely established that a No. 460 was sold for a No. 478 stamp; that appellee sold a counterfeit stamp or a stamp with a counterfeit cancellation; and that he did make a return of $270.00 on a purchase of $300.00. (Deposition of Henry Bedrin, p. 28.)

The transcript shows that the Honorable trial Court felt that truth was not a defense but rather that the writing of the truth required some further justification.

"The Court. That may be true. Maybe this man is not too competent as a stamp dealer, I don't know, but that is not the question we have before us.

Mr. Bloom. More important, there may be 10,000 different kinds of watermarks or conditions of stamps.

The Court. I am not going into the matter as to whether that is a good dealer, but much of an expert he is in the field.

Mr. Giometti. The question, if I may urge it, your Honor, is that he has sold these stamps.

The Court. It may be he made many common mistakes. That is beside the question. The question is whether or not there is any justification for these articles in the press. Every time these columnists don't like somebody isn't any excuse for their breaking forth with this sort of literature. I can't try out whether or not this man, this plaintiff is competent in the mind of someone else with respect to his identification of stamps.

Mr. Giometti. Very well, your Honor.

The Court. I can't see any purpose in going into it. I am not attempting to cut off your examination, but I don't see any point in an examination of the stamps before me in this case. What we have said is sufficient to make a record, so if I am in error you have it in the record.

Mr. Giometti. That is all."

(Tr. 81-82.)

It is respectfully submitted that the truth of the charges has been established by the evidence, therefore the trial Court's finding (Findings Nos. VI, VIII, IX) that the articles were false, constitutes reversible error.

III.

THE DAMAGES AWARDED BY THE TRIAL COURT ARE EXCESSIVE AND NOT SUPPORTED BY THE EVIDENCE.

The record discloses slight, if any, injury to the business of the appellee. Appellee testified that he had a rapidly expanding business but this testimony is in conflict with the figures submitted by him.

He commenced his part time stamp business in September of 1946. His gross volume for the last three or four months of that year was $5000.00. He did not testify to his profit for that year. (Tr. 35.)

In 1947 his gross volume was $15,000.00 and he claimed a net profit of $1,500.00. (Tr. 60.)

In 1948 his gross volume was approximately $20,000.00 and he claimed an approximate net profit of $2,500.00. (Tr. 59.)

In the first seven months of 1949 he testified that his gross volume was $11,000.00. He offered no evidence as to his profit for those seven months. Though he testified generally that his profit ran from 10 to 15% depending on how inventory was valued. (Tr. 35.)

This concrete evidence indicates that his volume for 1946 was as great or greater than 1947. It reveals an increase in 1948 and a slight leveling off in 1949. A continuation of his 1949 business at the same rate as for the first seven months of that year would have meant a gross volume of $18,852 for that year.

This decrease in volume can hardly be attributed to the effect of the articles. The testimony of all wit-

nesses was to the effect that the stamp business was off in 1949. Mr. Sankey, who conducts the largest stamp business in the West testified that business was off 10-20%. (Tr. 101.) Appellee testified that inventory prices declined a minimum of 10% in 1949. Obviously a decline of this nature would occasion a decline in volume. (Tr. 68.)

Joseph B. Abrams, Esquire testified on behalf of appellee that there were sixteen leading auction houses in the United States. (Tr. 29.) Appellee testified that the fourteen leading auction houses had expressed satisfaction with his method of doing business. (Tr. 49.) This testimony is in direct conflict with his testimony that subsequent to the publication of these articles he was unable to purchase the number of stamps by bid that he would ordinarily have been able to purchase. (Tr. 45.)

It must be borne in mind that the appellee was a part time stamp dealer and his principal occupation was that of an assistant credit manager in a bank.

Considering these facts, it must likewise follow that an award of $3000.00 general damages plus $7500.00 punitive damages is excessive and unjustified.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the judgment of the Honorable District Court should be reversed.

Dated, San Francisco, California,
June 9, 1950.

Respectfully submitted,
ARGUELLO AND GIOMETTI,
Attorneys for Appellant.

No. 12,492

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN W. GERBER,
Appellant

vs.

JACK E. MOLESWORTH,
Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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IN THE

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Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This appeal involves an action for libel or defamation. The original complaint (Tr. 2-6) may be paraphrased as follows:

Appellee Jack E. Molesworth is a philatelic broker and stamp dealer of Boston, Massachusetts enjoying a good name and reputation. Appellant Stephen W. Gerber is the author of a column called "Pets and Peeves" in a weekly magazine known as "Weekly Philatelic Gossip". This magazine is sold and distributed throughout the United States to stamp collectors, auctioneers, and other persons interested in philately. In the October 30, 1948 issue of the mag-

azine Gerber wrote in his column a scurrilous and defamatory article, in which he referred repeatedly to Molesworth as a "mole" under the heading of "What is a Mole Worth?", and in which he charged him with a variety of improper trade practices, including the deliberate substitution of one stamp (No. 460) for another (No. 478) in a sale. The language employed was both vicious and intemperate. For example, Gerber stated that Molesworth would "chisel" on the lots he purchased by offering them for sale before paid for and suggested that "the mole's worth will have to be tested in a different racket".

Thereafter Molesworth filed a supplemental complaint (Tr. 9-11) in the same form as the original one setting forth a second article by Gerber which appeared in the March 5, 1949 issue of "Weekly Philatelic Gossip". This time Gerber directly named Molesworth, repeated the original charges, added a few more, and employed language even more derogatory than before. He also referred specifically to the first article by date, as well as the lawsuit based thereon. The complaint and supplement thereto stated that Gerber's charges were false in their entirety, exposed Molesworth to hatred, contempt, ridicule, and obliquy, and injured him in his business of philatelic broker and stamp dealer.

The District Court found the articles to be libelous *per se,* false and defamatory. The court also found them to have been published maliciously and without due and proper investigation, to the great and grievous damage of appellee (Tr. 17-22). Judgment was

entered accordingly in favor of Molesworth and against Gerber in the sum of three thousand dollars ($3,000.00) general damages and seven thousand five hundred dollars ($7,500.00) exemplary damages (Tr. 24-25).

STATEMENT OF FACTS.

Gerber's statement of the case (Br. 2-6) is incomplete and misleading. Appellee will endeavor to correct this by a brief statement of facts based on the record.

Stephen Gerber is a stamp expert with 40 years of experience and was the owner of a stamp business known as the National Stamp Company (Tr. 114). Jack E. Molesworth is a young man of 23 years of age (Tr. 34) who sold stamps since the age of 14 (Tr. 58) and who helped finance his way through Tulane University and the Harvard Business School by engaging in the stamp business (Tr. 34).

The source of Gerber's animus against Molesworth is easy to discover. On October 13, 1947 Gerber purchased from Molesworth a No. 478 United States stamp (Tr. 37; Pl. Ex. 1). Gerber returned the stamp on November 13, 1947, stating that "We are inclined to think" that the stamp was a No. 460 and therefore improperly classified (Tr. 38; Pl. Ex. 2). No. 478 is exactly the same stamp as No. 460 except that one is water marked and the other is not (Tr. 60). The error had been originally made by the well known Boston stamp firm of W. T. Pollitz & Bros. who had incorrectly described the stamp in their September

1947 catalogue (Tr. 41; Tr. 74-76; Pl. Ex. 12). W. T. Pollitz & Bros. acknowledged their error to Molesworth and explained the reasons therefor (Pl. Ex. 13). This information was transmitted by Molesworth to Gerber when the stamp was returned (Tr. 41-42). Gerber, in turn, referred to the explanation in his March 6, 1948 column in the "Weekly Philatelic Gossip" (Pl. Ex. 20). The incident was thus closed and *the business relationship between Gerber and Molesworth was entirely cordial.**

On March 17, 1948 Gerber sent Molesworth an auction circular of one of his sales (Tr. 39; Pl. Ex. 3). In response thereto Molesworth was the successful bidder on six of the lots advertised for sale (Tr. 39-40). Molesworth subsequently returned three of the lots as misdescribed (Tr. 40). Gerber thereupon became infuriated and proceeded to write Molesworth two heated letters on May 31, and July 28, 1948 (Tr. 40; Pl. Ex. 4, 6). *This was the source of Gerber's animus, and from this time on Gerber began to strike.*

Appellant tries to convey the impression at this point that he received gratuitous advice from various stamp dealers concerning Molesworth (Br. 3). This is not true. The fact is that Gerber himself began to hunt for ammunition to shoot at Molesworth. Gerber solicited information about Molesworth from two or three dealers only (Tr. 134). Arthur Margulies on September 13, 1948 replied that Molesworth's returns were "justified" in some instances (Def. Ex. D). M.

*Emphasis is the author's unless otherwise indicated.

Ohlman on October 19, 1948 replied that Molesworth was "technically right" on his returns (Def. Ex. E). Hy Bedrin on August 23, 1948 told about a single transaction he had had with Molesworth and added some hearsay information purporting to come from other unnamed dealers (Def. Ex. F). This was the same Hy Bedrin whom the American Stamp Dealers Association had previously reprimanded for the sale of improperly described stamps by him to Molesworth (Tr. 135-137; Dep. Bedrin 34-36).

Gerber also claims he talked to Larry Borenstein, Herman Hurst and Al Henry about Molesworth (Tr. 116). Gerber himself admitted that Hurst said "nothing derogatory except that that was the first time I found out that Molesworth was young. He told me he was just a young fellow, a midshipman in the Naval Reserve getting an education * * *" (Tr. 120). Borenstein merely said that Molesworth was an "impetuous kid" (Tr. 120-121). Al Henry did not talk to Gerber until *after* the publication of the first libel (Tr. 107). Gerber made no effort to make inquiries of the principal New York and Boston dealers with whom Molesworth did business (Tr. 132-133). He did not give Molesworth a chance to defend himself or produce evidence (Tr. 90). Gerber's whole attitude may be summed up in his following testimony:

> "Q. Did you consider you were treating this young man fairly if you only wrote to two or three dealers out of 200 or 350 and then wrote this article?
>
> A. Absolutely."
>
> (Tr. 134.)

This was the state of the record on October 30, 1948 when Gerber wrote his first article in "Weekly Philatelic Gossip" reading as follows:

> "What's A Mole Worth? Actually nothing, unless you skin it. The mole is a darn nuisance that burrows blindly and aimlessly until trapped. The philatelic species runs true to form as a bore and a nuisance. Sometime ago, he slipped the trap by disclaiming responsibility for substituting No. 460 for No. 478 in a sale. He professes to be a 'philatelic broker' who has apparently been carrying on his limited operations at the expense of the large stamp auction houses. Quoting from a few of the reports we learn that, 'His returns have always been late and excessive * * * If he doesn't sell them, he returns the stamps.' Another report tells us that, 'He practically returns about 90% of the lots and they have all taken him off their list. We are doing likewise.' Another auction house quotes their experience to the effect that the mole returned $270 from a total of $300, after holding the property between two and three months. He justified the delayed returns with the unreasonable claim that the lots were not as described. From the information furnished to us it seems that he has operated at the auction houses' expense. He'd chisel on the lots by offering them for sale. If unsuccessful, they would eventually be returned, long after settlement date. This type of operation is a new and clever angle: as long as it can be carried on. But the gravy train is grinding to a stop and it's a painful fact that the mole's worth will have to be tested in a different racket—maybe going to work for a bank or something."
>
> (Pl. Ex. 7.)

We thus see that Gerber reverts to the No. 460-478 incident of August 13, 1947 on which he was fully informed and that he even misquotes the letters he had solicited.

Shocked by this vicious attack, Molesworth swallowed his pride and on November 8, 1948 wrote a letter to Gerber setting forth the facts about the charges Gerber had made. Concerning these charges Molesworth wrote:

> "That our recent personal controversy motivated them, I have no doubt, but in spite of the personal contempt that you have for me, I still believe that you will have the decency to print a retraction if I can furnish proof that that which you have written is untrue * * * Will you favor me with a chance to disprove your accusations by furnishing me with your sources, so that I can send you the facts?"
>
> (Pl. Ex. 8; Tr. 46-50.)

To this plea Gerber replied on November 19, 1948 as follows:

> "My first inclination was to tear up your letter of November 8th because I am convinced that your impetuousness, lack of common sense and decency is such that you are one who will never admit to being wrong. * * *
>
> Your letter indicts you just the same as your previous correspondence has * * *"
>
> (Pl. Ex. 9; Tr. 50.)

Gerber wanted no facts. Encouraged by the first libel, he was determined, as he wrote his associate

Borenstein on February 20, 1949, to "beat Molesworth's brains out" and "to take another swipe at him in an early column" (Pl. Ex. 18). Sure enough, in the March 5, 1949 issue of "Weekly Philatelic Gossip" Gerber returned to the attack with unrestrained viciousness. He wrote:

> "Gather Around, Dear Reader and enjoy the funniest story ever told. It furnishes proof positive that reporting stampic shenanigans is a risky vocation; especially, when a few gents are allergic to publicity. Pets and Peeves (October 30, 1948) published an item under the heading 'What's a Mole Worth?' Although no name was mentioned, a part-time Boston dealer named Jack E. Molesworth figured out that the shoe fit. So-o-o-, said J. E. M. has filed a libel action against us for a paltry $150,000 to assuage his financial hurt as an upright, honest, unimpeachable and expert stamp dealer. (Don't laugh yet.) If selling a counterfeit stamp, if misrepresenting a stamp cataloguing at $40.00 as being one catalogued at $55.00, if unreasonable demands and claims, if allegedly unsatisfactory auction settlements—if IF IF IF all of these are the distinguishing characteristics of an upright, honest, unimpeachable and well-informed stamp dealer, then we apologize. (Laughter, please.) We are reminded of one of several libel suits in recent years. A bozo sued Drew Pearson for libel. When the case was tried, Pearson proved the 'libel' and the bozo landed in the klink. When he saw the light, it was filtered through iron bars. We have two pertinent opinions, (1) this J.E.M. is being used as a tool to intimidate us in our fight for

decency in philately, (2) this J.E.M. won't dare to bring the case to trial."

(Pl. Ex. 10.)

These are the facts that impelled the trial judge at the conclusion of the case to state from the bench:

"I have read a lot of cases of libel and I never saw anything quite as bad as this. The character of the language, the utter arrogance of a man who sets himself up to be a judge of his fellow man, perhaps to ruin him by just a few words on some paper. It is unexplainable to me."

(Tr. 144.)

STATEMENT OF ARGUMENT.

We will now turn to the three specifications of error on which the appellant relies:

(1) THIRD PERSONS KNEW THAT THE FIRST LIBEL OF OCTOBER 30, 1948 REFERRED TO MOLESWORTH.

(a) This was apparent from the face of the libel itself.

On pages 7 to 12 of his brief Gerber argues that third persons did not know the first libel referred to Molesworth because he was not expressly named therein. It is elementary that a writing need not contain the *name* of the defamed person in order to constitute a libel. If the language used points a finger at the victim, that is enough.

Peterson v. Rasmussen, 47 Cal. App. 694, 698, 191 Pac. 30;

Vedovi v. Watson and Taylor, 104 Cal. App. 80, 83, 285 Pac. 418.

In this case the libel of October 30, 1948 left no room for doubt (Pl. Ex. 7). The victim's name is Molesworth. The libel was entitled "What's a Mole Worth?" and referred to the old No. 460-478 transaction which had been mentioned under Molesworth's full name in Gerber's column of March 6, 1948 (Pl. Ex. 20). The entire article was a play on the words "mole" and "worth". To remove all doubt, Gerber ended the article with the statement that "the mole's worth will have to be tested in a different racket—maybe going to work for a bank or something" (Pl. Ex. 7). This last was a crude reference to Molesworth's employment by a Boston bank (Tr. 55).

Gerber says that the district court judge "conceded" that the first libel did not identify anyone (Br. 9). Reference to the transcript, however, shows that the trial court was not even considering at that point whether Molesworth's identity could be deduced from the article (Tr. 135). He was merely asking Gerber how he expected to correct abuses in the stamp business, his allegedly lofty purpose, when he failed to name the person charged.

The cases cited by appellant (Br. 7-11) are cases where the libel points the finger at *no one*. With these cases we have no quarrel. They are inapplicable here.

(b) The second libel of March 5, 1949 removed any doubt as to the identity of the victim.

Appellant's specification of error is rendered meaningless by reference to Gerber's second article of

March 5, 1949 (Pl. Ex. 10) where Gerber specifically referred to the first libel by date (October 30, 1948) and stated:

> "Although no name was mentioned a part-time Boston dealer named Jack E. Molesworth figured the shoe fit."

In this brazen manner, Gerber removed all possible doubt as to the identity of the victim.

Proof of the identity of the victim may be shown by a subsequent libel written by the author of the original libel.

16 *Cal. Jur.* 106;
Russell v. Kelly, 44 Cal. 641, 13 Am. Rep. 169.

(c) The second libel alone supports the judgment.

Even were we to ignore the first libel entirely, appellant would be in no better position. The supplemental complaint (Tr. 9-12) is based on the second libel of March 5, 1949 (Pl. Ex. 10). This libel specifically referred to Molesworth by name, and referred back to the first libel. It repeats and enlarges on the identical charges made in the original article. The two articles appeared in and were disseminated by the same column in the same publication. Therefore, the trial court's finding in respect to the second article (Tr. 22), fully supports the judgment.

(d) The evidence clearly shows that third persons understood the identity of the victim of the first libel.

In any event, the *evidence* itself shows that third persons knew the first libel referred to Molesworth.

Concerning the effect of the first libel, Molesworth testified as follows:

> "Q. Now, at the close of the last session, Mr. Molesworth, you were testifying as to the effect of this first article in the Weekly Philatelic Gossip upon you. Were you finished with your answer?
>
> A. No, I was not.
>
> Q. Will you finish, please?
>
> A. To this time since the publication of this libel, I have been subjected to considerable ridicule and chiding and kidding by dealers around the country. I would enter an office and it would be 'How's the mole today?' 'What's the mole worth?' "
>
> (Tr. 44-45.)

To the same effect is the testimony of Joseph B. Abrams (Tr. 32). Appellant places a different construction on this testimony (Br. 11). We believe this construction is wholly unwarranted, but in view of the other evidence above referred to, it would serve no purpose to argue the matter further.

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(2) THE CHARGES MADE BY GERBER WERE FALSE AND DEFAMATORY.

On pages 12 to 17 of appellant's brief, we find the astounding claim that the libelous charges were proved to be true. Gerber apparently relies on the rule of law that the defendant is only required to justify the "gist" or "sting" of the libel, and need not justify each and every word thereof. This is the

rule set forth in the cases cited on page 16 of appellant's brief. With these cases we have no quarrel. But appellant chooses to disregard completely the corollary to this rule, to-wit, *the justification must be co-extensive with the charge and must extend to every reasonable inference to be drawn from the libel.*

53 *C. J. S.* 331.

This corollary is expressed by the very cases Gerber cites (Br. 16). For example, in *Tingley v. Times-Mirror Co.,* 151 Cal. 1, 89 Pac. 1097, the California Supreme Court states the rule as follows:

> "It is laid down that, in order to constitute a sufficient plea and justification, 'the justification must always be as broad as the charge and of the very charge attempted to be justified.' (Townsend on Libel and Slander, sec. 212.) This rule is too familiar to need further citation. While it is not necessary to justify every word of a defamatory charge, still the plea must meet the substantial imputation—the sting of the charge—as an ordinary reader of the article would understand it to have been made."
>
> (P. 25.)

The court in *Pyper v. Jennings,* 47 Cal. App. 623, 191 Pac. 565, stated the rule in this way:

> "The general rule is that the plea and justification must be as broad as the charge, and, in point of law, must be identical with it."
>
> (P. 630.)

Let us therefore consider precisely what the "gist" or "sting" of the defamatory articles is.

(a) **The "gist" of Gerber's charges was that Molesworth is a deliberately dishonest and unethical stamp dealer.**

The trial court found that Gerber's articles were libelous *per se* (Tr. 22).

See

California Civil Code, Sec. 45a.

This is apparent from an examination of the articles themselves. Thus in the article of October 30, 1948 (Pl. Ex. 7) Gerber charged:

> "He professes to be a 'philatelic broker' who has apparently been carrying on his limited operations at the expense of the large stamp auction houses * * * He justified the delayed returns with the unreasonable claim that the lots were not as described. From the information furnished to us it seems that he has operated at the auction houses' expense; He'd chisel on the lots by offering them for sale. If unsuccessful, they would eventually be returned, long after settlement date * * * But the gravy train is grinding to a stop and it's a painful fact that the mole's worth will have to be tested in a different racket—maybe going to work for a bank or something."

Gerber's article of March 5, 1949 (Pl. Ex. 10) made the following charges:

> "If selling a counterfeit stamp, if misrepresenting a stamp cataloguing at $40.00 as being one catalogued at $55.00, if unreasonable demands and claims, if allegedly unsatisfactory auction settlements—if IF IF IF all of these are the distinguishing characteristics of an upright, honest, unimpeachable and well-informed stamp dealer, then we apologize. (Laughter, please.)"

It is thus apparent that the "sting" or "gist" of these articles is not that Molesworth *innocently* misrepresented a particular stamp or *negligently* made late returns, as Gerber argues (Br. 12). The basic imputation is *deliberate misconduct and continued unethical trade practices by Molesworth.*

Gerber states that the trial court erroneously felt that defendant had to prove something more than truth (Br. 16-17). This is untrue. The court was properly interested in the "gist" or "sting" of the charges only. This is clearly shown by the following observations of the trial court:

> "Maybe this man is not too competent as a stamp dealer. I don't know, but that is not the question we have before us. * * *"
>
> (Tr. 81.)

> "It may be he made many common mistakes. That is beside the question. The question is whether or not there is any justification for these articles in the press. Every time these columnists don't like somebody isn't any excuse for their breaking forth with this sort of literature. I can't try out whether or not this man, this plaintiff, is competent in the mind of someone else with respect to his identification of stamps."
>
> (Tr. 82.)

Now let us examine the truth or falsity of the "gist" of Gerber's charges.

(b) **The evidence shows that the charges made by Gerber are absolutely untrue.**

It is elementary that the burden of proving the truth of the "gist" of the charges lies with defendant (*Dethlefsen v. Stull,* 86 Cal. App. (2d) 499, 506; 195 Pac. (2d) 56). The articles themselves must be considered in their entirety. They cannot be divided into segments and each portion treated as a separate unit (*Stevens v. Storke,* 191 Cal. 329, 334; 216 Pac. 371). They must be construed "as well from the expressions used, as from the whole scope and apparent object of the writer" (*Bates v. Campbell,* 213 Cal. 438, 441; 2 Pac. (2d) 383). They must be tested not only by the particular words used, but also by the natural and probable effect on the mind of the reader (*Bettner v. Holt,* 70 Cal. 270, 274, 275; 11 Pac. 713).

With these rules in mind, let us examine Gerber's charges:

The first charge is that a No. 460 stamp was sold for a No. 478 (Br. 12-14). We have already reviewed the circumstances of this innocent mistake. Gerber purchased the stamp from Molesworth on October 31, 1947 (Tr. 37; Pl. Ex. 1). He returned the stamp on November 13, with the statement that "we are inclined to think" it was a No. 460 and therefore improperly classified (Tr. 38; Pl. Ex. 2).

The two stamps were identical except that one was water-marked and the other was not (Tr. 60). Moles-

worth had previously purchased the stamp from the leading Boston firm of W. T. Pollitz & Bros. in September of 1947. Pollitz had incorrectly described the stamp (Tr. 41; Tr. 74-76; Pl. Ex. 12). Pollitz later apologized for the error and in explanation said:

> "In this regard it is apropos to emphasize that the correct classification of the United States 1914-1915 and 1916-1917 issue is a difficult task to accomplish and that mistakes in such classification are quite common, especially when a stamp has been well hinged and the gum thereby disturbed as was the case in this instance."
>
> (Pl. Ex. 13.)

This information was transmitted by Molesworth to Gerber when the stamp was returned (Tr. 41-42). Gerber accepted the explanation and even referred to the same in his March 6, 1948 column (Pl. Ex. 20).

That the mistake was a natural one to make and innocent in its entirety is shown not only by the letter from Pollitz, but also by the following testimony of Molesworth:

> "Q. Would it be easy or difficult to determine whether that stamp is water-marked?
>
> A. It would depend on where the stamp was in the set. The catalog will show this particular stamp was very difficult to determine the water-mark, and in fact, I myself never did see a water-mark on it.
>
> Q. Tell His Honor why it was difficult.
>
> A. Sometimes, your Honor, a complete water-mark will show on a stamp. In other places in the set only a portion of the water-mark will

show on the stamp. One copy on a certain stamp may have a very obvious water-mark, and another copy may have one very difficult to detect. In this case the stamp had been placed in an album with a hinge on it, and it left a mark there which increased the difficulty of seeing the water-mark, especially if the stamp is under the hinge, which was the case in this instance."

(Tr. 76-77.)

After the publication of the first libel, Molesworth again explained all of the circumstances to Gerber in his letter of November 8, 1948 (Pl. Ex. 8). Gerber, nevertheless, proceeded to repeat the same charge in his article of March 5, 1949, wherein he said that Molesworth "misrepresented a stamp cataloguing at $40.00 as being one catalogued at $55.00" (Pl. Ex. 10).

Thus, Gerber charged Molesworth with the *deliberate and premeditated* substitution of one stamp for another. That is the "gist" or "sting" of the charge. The evidence shows that the charge is false in its entirety.

The next charge which Gerber claims to be true is the accusation that Molesworth sold a "counterfeit" stamp (Br. 14-15). At the outset it should be made clear that the stamp in question was not a "counterfeit". The stamp was a genuine Confederate stamp on which there was a fake cancellation (Tr. 53). Molesworth had consigned the stamp to one, Larry Boren-

stein, who sold it to John A. Fox, a leading dealer in Confederate stamps. There was some doubt as to the authenticity of the cancellation. Fox, therefore, bought the stamp with the express understanding that if it were not genuine it could be returned (Tr. 53, 65-66). Fox kept the stamp for five or six months and finally inserted it in one of his auction sales (Tr. 54). Molesworth had checked the authenticity of the stamp before it was sent to Borenstein by reference to Scott's United States Specialized Catalogue, which indicated that the cancellation was genuine (Tr. 63). Even though Mr. Fox, the authority on Confederate stamps, had himself failed to detect the error, and even though he had kept the stamp for over six months, Molesworth immediately refunded Fox's money when the mistake was called to his attention (Def. Ex. A). Molesworth at the time felt that he was entitled to some explanation from Fox concerning the delay. On March 2, 1949, Fox wrote a letter of apology to Molesworth in which he said that he had bought the stamp in Denver in the summer time and had put it away without bothering to check the same (Pl. Ex. 14). Finally, Fox himself states that all of his dealings with Molesworth were satisfactory in all respects (Pl. Ex. 15).

From the foregoing, it is clear that Gerber's charge that Molesworth deliberately and with premeditation sold a "counterfeit" stamp is false and defamatory.

Thirdly, Gerber charged that Molesworth's returns returns were late and excessive. He blithely dismisses these charges as non-libelous (Br. 15). Here again Gerber deliberately avoids the "sting" of the accusation. Naturally, the isolated statement that a stamp dealer bought $300.00 worth of stamps and returned $270.00 of them is inoffensive of itself. But let us see how Gerber treated this matter of returns.

In the article of October 30, 1948 (Pl. Ex. 7) Gerber said:

> "He professes to be a 'philatelic broker' who has apparently been carrying on his limited operations at the expense of the large stamp auction houses. Quoting from a few of the reports we learn that, 'His returns have always been late and excessive * * * If he does not sell them he returns the stamps'. Another report tells us that 'He practically returns about 90% of the lots and they have all taken him off their list. We are doing likewise'. Another auction house quotes their experience to the effect that the mole returned $270.00 from a total of $300.00, after holding the property between two and three months. He justified the delayed return with the unreasonable claim that the lots were not as described. From the information furnished to us it seems that he has operated at the auction houses' expense. He'd chisel on the lots by offering them for sale. If unsuccessful, they would eventually be returned, long after settlement date."

In the article of March 5, 1949 (Pl. Ex. 10), Gerber said:

> "If selling a counterfeit stamp, if misrepresenting a stamp catalogued at $40.00 as being one catalogued at $55.00, if unreasonable demands and claims, if *allegedly unsatisfactory auction settlements*—if IF IF IF all of these are the distinguishing characteristics of an upright, honest, unimpeachable and well-informed stamp dealer, then we apologize. (Laughter, please.)"

We thus see that the "gist" or "sting" is that Molesworth deliberately and dishonestly took advantage of the auction houses by returning merchandise which he was unable to sell, and by returning an excessive amount of merchandise.

All of Gerber's information, according to his own testimony, came from Hy Bedrin, Arthur Margulies, M. Ohlman, Al Henry, Larry Borenstein, and Herman Hurst (Tr. 134, 116). Molesworth bought $351.50 worth of stamps from Bedrin and returned stamps in the sum of $247.15. The returns were made within ten days after Molesworth actually received the same (Tr. 70). They were returned because they were misdescribed by Bedrin (Tr. 136). This is the same Hy Bedrin who had sold Molesworth other misdescribed stamps for which Bedrin was reprimanded by the American Stamp Dealers Association (Tr. 136; Dep. Bedrin 34-36). The only "late return" to Bedrin was the misdescribed lot Molesworth sent to the American Stamp Dealers Association, and which the association subsequently returned to Bedrin (Dep. Bedrin 40). It was impossible for Bedrin to know about the experiences of any other dealers with

Molesworth for the reason that he did not discuss Molesworth with any one, as he admitted in his deposition (Dep. Bedrin 30).

Arthur Margulies admitted that Molesworth's returns were "justified" (Def. Ex. D). Furthermore, a detailed analysis of all transactions between Margulies and Molesworth shows that Molesworth was prompt in his payments to him, and that a transaction between Margulies and Molesworth was pending at the time of trial (Tr. 141; Dep. Margulies 17-23).

Molesworth had two transaction with M. Ohlman. The first purchase was on May 7, 1948 for $84.00, $71.75 of which was retained and paid for within seven days thereafter (Tr. 140; Def. Ex. E). The second purchase was made on July 29, 1948 and was paid for within two days after purchase (Tr. 140). On August 19, 1948 Ohlman himself wrote Gerber that Molesworth was "technically right" on these returns (Tr. 140; Def. Ex. E).

We have already seen that neither Borenstein nor Hurst had made derogatory statements about Molesworth to Gerber (*Supra,* p. 5). As for Albert Henry, the San Francisco stamp dealer, it developed that he had one transaction only with Molesworth. On cross-examination he testified that a purchase was made from him on October 20, 1947 which was paid for by check on November 3, 1947 (Tr. 109).

Finally, Molesworth brought to the court room 14 letters from the leading auction houses in the United

States expressing satisfaction with the manner in which he did business (Tr. 49).

As the trial court stated, Gerber's articles are an example of one satisfying a personal peeve on the "sheerest hearsay" (Tr. 143). The "gist" of his charges was entirely false.

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(3) THE DAMAGES AWARDED BY THE TRIAL COURT ARE FAIR AND REASONABLE.

(a) The award of $3,000.00 general damages is extremely modest.

The trial court called this a particularly aggravated case (Tr. 142-148). The language used was vicious and the charges struck at the very basis of Molesworth's business reputation. Nevertheless, Gerber, on pages 18-19 of his brief, claims that the evidence does not support the damages awarded.

Gerber forgets that the articles were libelous *per se,* and the trial court so found (Finding X, Tr. 22). Clearly, the charges had a natural tendency to expose Molesworth to hatred and contempt and to injure him in his business of philatelic broker (Cal. Civil Code, Sec. 45a).

Since the libels were defamatory on their face, they do not require proof of special damage. General damages are necessarily presumed, as the natural and probable consequence of the language used. The rule was thus expressed in *Jimeno v. Home Builders,* 47 Cal. App. 660; 191 Pac. 64, as follows:

> "If, on its face, the publication is of a character that usually, ordinarily, and naturally detracts from the reputation and standing of the plaintiff, and tends proximately and naturally to deprive him of the confidence and esteem of others, thus causing him to be shunned or avoided, it is libelous *per se,* and special damages need not be alleged or proved. From such a publication the law presumes general damages as a natural and probable consequence."
>
> (Pp. 663-664.)

In this respect the law is fortunately realistic. When a man's business reputation is attacked by words libelous *per se,* he rarely, if ever, knows what particular persons refuse to do business with him thereafter. It is obvious that the language must have done damage in the natural course of events, and the injured party is not left without remedy.

In *Scott v. Times-Mirror Co.,* 181 Cal. 345, 184 Pac. 672, where there was an award of $7,500.00 general damages and $30,000.00 exemplary damages, the court said:

> "The respondent is not required to prove, and in the nature of things cannot prove, the extent to which he has been damaged by this libel, or of what legal fees he has been deprived through its circulation, or what clients he has lost because of it. It is well settled that in such cases as this a jury may consider as a basis for its award of actual damages all of such matters as those set out above, including the wide publicity

given to the libel, plaintiff's prominence in the community where he lives, his professional standing, his good name and reputation, his injured feelings and his mental suffering."

(p. 365.)

(b) The evidence itself supports the damages awarded.

Even though Molesworth was not required to prove the extent of the damages, under the foregoing rules, he nevertheless did so. The evidence showed that from the year 1946 until the publication of the articles in question, Molesworth had a steadily and rapidly increasing business. Thus in 1946 his gross business was $5,000.00. In 1947 it exceeded $15,000.00. In 1948 it was in excess of $20,000.00. But during the first seven months of 1949 the volume fell off to $11,000.00 (Tr. 35). Molesworth testified as follows:

"Q. Is it a general statement that the volume of business you have transacted in 1949 up to date is substantially the same or is it less in volume than in 1948?

A. It is slightly less in volume.

Q. And with the exception of that experience with this year, has your business been increasing or decreasing, an increasing or decreasing business?

A. My business was a rapidly expanding business prior to the publication of this article, no question.

* * * * * * *

Q. Your business was expanding? Let's put it this way: Your business was expanding up to the date of the publication of this first article, which

was in the latter part of October, or October 30, 1948, is that correct?

A. That is true."

(Tr. 35-36.)

Gerber does not deny this testimony. But he tries to escape the consequences by calling attention to the testimony of one of his witnesses, a Mr. Sankey, to the effect that stamp business in the West fell off in 1949 (Br. 19). But this same witness testified that he knew of no trade journals or authentic statistics on the subject (Tr. 99). Molesworth testified that the level of business depended upon the experience of the particular dealer (Tr. 66) and that Stanley Gibbons, one of the largest dealers in the United States, had personally told him that the volume for 1949 was higher than in 1948 (Tr. 67).

Certainly there is ample evidence of damage to Molesworth's business by reason of the libelous articles.

Another element of damages which the trial court undoubtedly considered was the effect of the libels on Molesworth's ability to purchase stamps.

Gerber's comments on the evidence pertaining to this subject are both inaccurate and misleading (Br. 19). He states that Joseph B. Abrams testified that there were 16 leading auction houses in the United States. Reference to the transcript shows that Abrams, in making a general description of the man-

ner in which the stamp business is conducted, stated that the ordinary method of selling stamps involving *the rich and valuable collections* is by auction sale. These auctions are held, for the most part, in New York City. The business is concentrated in the hands of perhaps a dozen large auction houses in New York City (Tr. 28-29). Abrams did *not* testify that these were the only auction houses in the United States. Gerber, himself, testified that there were possibly 350 auction houses in the United States (Tr. 134). Molesworth testified that he had 14 letters from the leading auctioneers expressing satisfaction with his manner of doing business (Tr. 49).

From the foregoing evidence, Gerber draws the unwarranted conclusion that Molesworth's ability to purchase stamps was not affected by the libels. A brief quotation from Molesworth's testimony will demonstrate the falsity of this conclusion:

> "Q. What effect, if any, has this publication had on your stamp business?
>
> A. In the two months prior to the publication of this libel, my auction purchases amounted to $3,200.00. After the publication of this libel, the last eight months, the total auction purchases were only $6,000.00. I bid in approximately the same number of sales, same number of bids, approximately, and the same percentage of retail. I believe some of my bids were not recorded by virtue of that libel, and therefore I wasn't able to purchase the number of stamps I would have been able to purchase ordinarily. If I couldn't buy, I couldn't sell."
>
> (Tr. 45.)

Gerber tries to discredit Molesworth by calling him a "part-time" stamp dealer and calls particular attention to the fact that he is employed as an assistant credit manager in a bank (Br. 19). Let us examine the record on this point. At the time of trial Molesworth was 23 years old (Tr. 34). He had run his first national stamp ad in 1939 when he was but 14 years of age (Tr. 33). He was therefore engaged in the stamp business as a dealer for 10 years (Tr. 33). After his discharge from the Navy in 1946, he attended Tulane University with government assistance, and earned the balance of his living expenses by continuing in the stamp business (Tr. 34). At that time, Molesworth secured a $2,000.00 G. I. loan from the Mercantile Bank and Trust Company of Kansas City, Missouri for the purpose of going into the stamp business, and a balance of $1,000.00 remained due and owing thereon at time of trial (Tr. 35). He then attended the Harvard Business School for 16 months and continued in the stamp business as before (Tr. 34). Upon graduation from Harvard, he became manager of the credit department of the Rockland Atlas National Bank of Boston, Massachusetts (Tr. 34, 35). Thereafter he spent approximately 30 hours per week in the stamp business and 40 hours a week in his bank job (Tr. 34). In answer to the inquiry as to whether he intended to make the stamp business his full time occupation, Molesworth answered:

> "It has been my intention for some years to eventually enter the stamp business on a full time

basis once I have acquired sufficient capital to do it in the manner in which I desire to do it."

(Tr. 35.)

Another element of damages which Gerber chooses to disregard is the injury to Molesworth's feelings and reputation. The law does not require proof of this element of damages. The rule is stated in *Newby v. Times-Mirror Co.*, 46 Cal. App. 110; 188 Pac. 1008, as follows:

"But, to the complaint against the size of the verdict, there is still another answer, to wit: That, among the elements of actual damage which may be considered and made a part of the bases of the actual detriment suffered by the plaintiff from the publications, is not only the loss of reputation, but also the shame, the mortification and injury to feelings, etc., and of these elements it has been said: 'While special damages must be alleged and proved, general damages for outrage to feelings and loss of reputation need not be alleged in detail, and may be recovered in the absence of actual proof; and to the amount that the jury estimates will fairly compensate plaintiff for the injury done.' "

(p. 132.)

As a matter of fact, evidence was introduced on this subject. Molesworth testified:

"Q. Tell us what effect the reading of the article had upon you.

A. The full impact of it was terrific upon me. In fact, I was terribly upset, especially by the

fact that the statements were completely untrue and had no foundation. Going further, I knew that this would have a drastic effect on my business, not only buying, but also selling stamps, especially the buying and selling of stamps through auctions, buy but can not sell——

Q. To sum up, what was your state of mind after you read this article there?

A. It made me highly nervous and also practically made me sick at the thought of what my parents wouuld think, especially my mother, when she saw the article. She, my mother, is in very poor health, a very nervous person, and the shock of the article could be sufficient to kill her under proper circumstances."

(Tr. 44.)

* * * * * * *

"Q. Now, at the close of the last session, Mr. Molesworth, you were testifying as to the effect of this first article in the Weekly Philatelic Gossip upon you. Were you finished with your answer?

A. No, I was not.

Q. Will you finish, please?

A. To this time since the publication of this libel, I have been subjected to considerable ridicule and chiding and kidding by dealers around the country. I would enter an office and it would be 'How's the mole today?' 'What's the mole worth?' References of that nature which naturally caused me bad feeling and mental tension."

(Tr. 44-45.)

In the final analysis, there is an even more salient reason why the damages awarded are extremely rea-

sonable. The selling and buying of stamps is to a great extent, dependent upon the confidence in and integrity of the dealer. This is inherent in the nature of the stamp business, which was graphically explained by Mr. Abrams (Tr. 28-31). He summed up this basic fact as follows:

> "In general, finishing up this aspect of the case, all I can say is that the stamp business is concentrated in the hands of a relatively few people, and the slightest breath of suspicion will affect any dealer and is enough to ruin him in the eyes of the few serious collectors in the stamp field."
>
> (Tr. 31.)

Sankey, one of Gerber's witnesses, also testified to the same effect:

> "Q. Would you say, Mr. Sankey, that integrity is an important thing in the business of selling stamps?
>
> A. I personally think it is an essential thing.
>
> Q. Without confidence in the dealer, is it really impossible for the dealer to remain in business?
>
> A. I would think so, yes."
>
> (Tr. 102-103.)

When we remember that approximately 15,000 copies of "Weekly Philatelic Gossip" are distributed throughout the United States (Tr. 84) and almost exclusively to stamp collectors, auctioneers and other persons interested in philately (Tr. 20) and that Gerber was a man of 40 years of experience in the stamp business who received fan mail from all over the coun-

try (Tr. 84), we can begin to appreciate the damage to Molesworth's reputation created by these libelous articles.

This Honorable Court has had occasion to consider the matter of damages in actions of this type. In *Liquid Veneer Corporation v. Smuckler,* 90 Fed. (2d) (C.C.A. 9th) 196, this court affirmed an award of $11,000.00 general damages and $9,000.00 punitive damages in a case based on a libelous letter sent by defendant to a customer of the manufacturer charging the plaintiff with dishonesty in trade practices and with manufacturing an infringing product. In many respects the language used was very mild in respect to Gerber's. This court stated:

> "The jury allowed for loss of business $11,000.00, and this court, under the Seventh Amendment to the Constitution, may not deprive appellee of the benefit of the verdict; the amount is in no sense unconscionable; and as the matter of exemplary damages was left entirely to the discretion of the jury, the court cannot invade the province of the jury and say that this amount, $9,000.00, was excessive."
>
> (p. 205.)

(c) Molesworth is entitled to substantial exemplary damages.

Finally, we submit that this is a case wherein the award of $7,500.00 punitive or exemplary damages was completely justified. There is no necessity to review the evidence in this regard. We have seen that Gerber's animosity arose out of a private quarrel

with Molesworth and that he published his first article without any investigation of the facts and with knowledge of their falsity. We have seen that Molesworth pleaded thereafter with Gerber to permit him to state his side of the controversy, but Gerber was not interested. Worse than that, Gerber continued his deliberate plan of character assassination by publishing a second and more scurrilous article which repeated and expanded upon the original charges. This is malice in a vicious and calculated form, and as applied to a young man on the threshold of his business career, it was base and contemptible.

The depth of Gerber's hatred against Molesworth was almost unbelievable. After the first libel had been written, Molesworth wrote to Gerber on November 8, 1948 pleading for the opportunity to provide Gerber with all of the facts of the case (Pl. Ex. 8). On November 19, 1948 Gerber flatly rejected the plea, hurled further invective on Molesworth, and said:

> "Your letter *indicts* you just the same as your previous correspondence has."
>
> (Pl. Ex. 9.)

On February 20, 1949 Gerber wrote to his fellow columnist, Borenstein, stating:

> "This kid is sticking his chin out a bit too hard. He is going to get clipped as he is locking horns with the wrong guy. * * * I hope he tries the suit. He'll get his brains beaten out. I am so 'scared' that I am taking another swipe at him in an early column."
>
> (Pl. Ex. 18.)

In this same letter, Gerber even took it upon himself to falsely charge that Molesworth was wearing a Navy uniform illegally. The second libelous article followed shortly thereafter (Pl. Ex. 10).

Nor was Gerber's maliciousness confined to Molesworth. Gerber was a person who debased the power of the press by using that power indiscriminately against anyone whom he disliked. He cared not about the damage to his victims. The malignancy in his heart was revealed by his own testimony from the witness stand, where he did not hesitate to hurl personal "indictments" against some of the leading stamp auction houses in the United States. Gerber said:

> "Q. And did inquire of some of these leading concerns like Harmer, Rooke & Co., Jack Morrison, Inc.?
>
> A. They are not my ideas of leading concerns. I have indictments against both of them.
>
> Q. You have?
>
> A. I have indictments of my own against both of them.
>
> Q. You have indictments?
>
> A. That is what I said, yes, sir. I indict both of them.
>
> Q. You mean mentally?
>
> A. No, for their dealings on the record. I have made them the object of discussion, too."
>
> (Tr. 133-134.)

This then is a clear case where exemplary damages are both necessary and proper. In such a situation, the law is clear. *Meyers v. Berg,* 212 Cal. 415; 298 Pac. 806, stated the rule as follows:

"It is difficult to determine the proper amount of damages in an action of this character, and for this reason the law has wisely left it to the just discretion of the jury, and has given to them the right, upon proof that the defendant was guilty of malice, to give damages for the sake of example and by way of punishing the defendant. (Civ. Code, sec. 3294)."

(pp. 418-419.)

We respectfully submit that the judgment of the district court should be affirmed.

Dated, San Francisco, California,
August 7, 1950.

Respectfully submitted,
LEONARD J. BLOOM,
M. S. HUBERMAN,
Attorneys for Appellee.

No. 12,492

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN W. GERBER,

Appellant,

vs.

JACK E. MOLESWORTH,

Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appeal from the United States District Court, Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

Appellant herewith answers certain of appellee's arguments which are erroneous.

I. WHERE PLAINTIFF IS NOT NAMED IN A LIBELOUS PUBLICATION, HE MUST PROVE THAT SOME THIRD PERSON UNDERSTOOD THAT HE WAS THE PERSON REFERRED TO.

On pages 9 and 10 of appellee's brief the rule of law is stated that it is elementary that a writing need not contain the name of the defamed person in order to constitute a libel. Appellee further states that if the language used points a finger at the victim, that is enough.

In this connection appellant respectfully points out that appellee has confused matters of pleading with matters of substantive proof. The rule as stated by appellee is a rule of pleading, the standard of proof universally accepted in this situation is that a third party must have understood that the article was written of and concerning the defamed person, and that the libelous expressions referred to him. Thus, in pleading, plaintiff need not allege a third person understood the defamatory article was written of and concerning the plaintiff, but on the trial the plaintiff must prove this fact.

This distinction is precisely enunciated in *Dewing v. Blodgett,* 124 Cal. App. 100, 11 P. (2d) 1105. There defendant published an article accusing a Court reporter, not named, of feloniously falsifying a transcript. Plaintiff on the trial of the case proved that he was the official Court reporter of the Court referred to and testimony was offered by third parties that they knew and understood that the party referred to was the plaintiff.

The Court stated that "the fact that the name of the plaintiff was not contained in the libelous articles does not deprive the plaintiff of his remedy when those articles gave a description which was capable of directing attention to him, and when, as here, it was alleged and proved that readers of the articles understood them as referring to the plaintiff".

In the instant case, appellee failed to prove on the trial of the action that third persons understood the article of October 30th, 1948 referred to the appellee.

II. THOUGH THE IDENTITY OF THE PLAINTIFF IS REVEALED BY A SUBSEQUENT PUBLICATION IT REMAINS FOR PLAINTIFF TO PROVE THAT THIRD PERSONS UNDERSTOOD THE FIRST LIBEL WAS WRITTEN ABOUT HIM.

On pages 10 and 11 appellee argues that the second libel removed any doubt as to the identity of the victim. Assuming this to be true, it still would not obviate the necessity of plaintiff proving third persons understood the first libel was written about the plaintiff.

It is a fundamental concept that every individual libel is a separate and distinct tort, and consequently each must stand alone. A subsequent libel in which plaintiff is named is competent evidence only to identify him as the person defendant had in mind in the first article. This was the holding in *Russell v. Kelly,* 44 Cal. 641.

But a subsequent libel naming the plaintiff will not serve to prove that third persons initially understood the first article, in which plaintiff was not named as having been written about the plaintiff.

III. THE SECOND LIBEL STANDING BY ITSELF WILL NOT SUPPORT THE JUDGMENT.

On page 11 appellee contends that the second libel alone supports the judgment. Appellant cannot accede to this view.

The honorable trial Court in its findings specifically held that the article published on October 30, 1948 was libelous *per se* and injured plaintiff in his business and occupation. (Tr. 20, 21 and 22.)

In view of the Court's finding, under what theory can it be said that the second article alone supports the judgment? It is apparent that some portion of the damages assessed were predicated on the article of October 30, 1948.

From an examination of the findings and the transcript it is impossible to determine the apportionment the trial Court had in mind at the time the damages were assessed.

Appellee argues that the damages resulting from the second article are sufficient to support the judgment. The argument is erroneous for two reasons: First, because it is direct conflict with findings made by the trial Court, and second, it would require the Appellate Court to substitute its judgment on the facts for that of the trial Court.

CONCLUSION.

Appellant does not answer the remaining arguments made by appellee, because appellant considers such arguments to have been met in appellant's opening brief.

In view of the foregoing it is respectfully urged that the judgment of the Honorable District Court be reversed.

Dated, San Francisco, California,
September 20, 1950.

ALEX L. ARGUELLO,
MARVIN G. GIOMETTI,
Attorneys for Appellant.

No. 12493

United States
Court of Appeals
For the Ninth Circuit.

J. GORDON TURNBULL, SVERNDRUP AND PARCEL and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, FEDERAL SECURITY AGENCY and LOIS G. M. ROSS, alleged widow of Kenneth R. Ross, and JOHN CARY ROSS, a minor child,

Appellees.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the United States District Court for the Northern District of California, Southern Division

No. 28237H

J. GORDON TURNBULL and SVERNDRUP AND PARCEL, and U. S. FIDELITY AND GUARANTY COMPANY,

Complainants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency, and LOIS G. M. ROSS, alleged widow of KENNETH R. ROSS and JOHN GARY ROSS, a minor child,

Respondent.

COMPLAINT TO REVIEW COMPENSATION ORDER AND FOR INJUNCTION

Complainants complain of respondents above-named and allege as follows:

I.

That complainants, J. Gordon Turnbull and Sverndrup and Parcel were at all times herein mentioned individuals.

II.

That the complainant, U. S. Fidelity and Guaranty Company is and was at all times herein mentioned a corporation, duly organized and existing

under and by virtue of the laws of the State of Maryland, and duly organized to operate and do business within the State of California, and elsewhere within the United States, and in particular at locations without the territorial limits of the continental United States including defense bases as the same are described in Section 1651 U. S. Code, 42.

III.

That the respondent, Albert J. Cyr, is and at all times herein mentioned has been a deputy commissioner of the Bureau of Employees' Compensation, Federal Security Agency, formerly known as the United States Employees' Compensation Commission, and has functioned in said capacity of a deputy commissioner in the Fourteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency, and at the time of the issuance of the compensation order herein complained of was a deputy commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency, and that said Thirteenth Compensation District includes the State of California; that said deputy commissioner, the said Albert J. Cyr administers the provisions of that certain act of Congress known as the "Defense Base Act," which is an extension of the provision of Longshoremen and Harbor Workers Compensation Act as contained in 42 U. S. Code 1651-1654 enacted by Congress August 16, 1941.

IV.

That Lois G. M. Ross, alleged widow of Kenneth R. Ross, deceased, and John Gary Ross are the persons in whose favor an award for death benefit was made, as hereinafter related, and both of said respondents are therefore beneficially interested in this proceeding, and for that reason are made party respondents.

V.

That this Court has jurisdiction in this cause of action by reason of the provisions of the Longshoremen's and Harbor Workers Compensation Act (Title 33), Sec. 901 U. S. Code, (44 Stat. 1424) as extended by Act of Congress of the United States approved August 16, 1941, 55 Stat. 623 (42 U.S.C.A. Secs. 1651-1654) ("Defense Bases Act"), and particularly by reason of Section 1653(b) thereof, reading as follows:

"(b) Judicial proceedings provided under Sections 918 and 921 of Title 33 in respect to a compensation order made pursuant to Sections 1651-1654 of this title shall be instituted in the United States District Court of the judicial districts wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs."

In accordance with the aforesaid subsection (b)

this complaint for injunction is brought pursuant to the procedure set forth in the Longshoremen's and Harborworker's Compensation Act of March 4, 1927, as amended (45 Stat. 921; 33 U.S.C.A. Section 921), and hereinafter called "The Act."

VI.

That on or about March 17, 1943 Kenneth R. Ross, deceased, entered the employ of complainants J. Gordon Turnbull and Sverdrup and Parcel, on a United States defense base project known as "Canol" which was located within the Dominion of Canada; that thereafter said Kenneth R. Ross became totally disabled on account of a flareup of a previous quiescent tuberculosis from October 27, 1943 up to and including March 30, 1948, save and except 30 days wherein he worked in the year 1945; that prior to April 26, 1946 said Kenneth R. Ross applied to the Fourteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency for benefits under the Defense Base Act hereinbefore mentioned; that on date April 26, 1946, Deputy Commissioner Albert J. Cyr, then attached to the Fourteenth Compensation District, issued a compensation order rejecting said Kenneth R. Ross' claim for benefits; that thereafter said Kenneth R. Ross became a resident of the State of California, which is in the territory of the Thirteenth Compensation District, and upon his application his file was duly transferred from the Fourteenth Compensation District to said Thirteenth

Compensation District; that thereafter on proper application and showing to Warren H. Pillsbury, a deputy commissioner for the Thirteenth Compensation District for the Bureau of Employees' Compensation, Federal Security Agency, issued an order allowing benefits under the provisions of the "Defense Base Act" heretofore mentioned, against complainants here; that said order was issued on April 26, 1946 and became final on or about May 26, 1946 as no appeal from said order was taken. Said order provided for the payment of compensation benefits at the rate of $25 per week to Kenneth Ross from October 27, 1943 up to and including February 4, 1946 and continuing in accordance with his thereafter actual disability.

VII.

That said Kenneth R. Ross died as a result of his injuries on March 30, 1948 in Denver, Colorado, which is within the jurisdictional limits of the Thirteenth Compensation District.

IX.

That thereafter respondent Lois G. M. Ross, filed her verified application for death benefits as provided for in said "Defense Base Act," alleging that she was the widow of said Kenneth R. Ross, deceased, and that said marriage had taken place before a Justice of the Peace at Tia Juana, Mexico on October 5, 1946.

X.

That on and before March 13, 1943 complainant U. S. Fidelity and Guaranty Company, under and by virtue of a contract with J. Gordon Turnbull and Sverdrup and Parcel, insured said employers against the liability imposed against it by the Defense Base Act.

XI.

That after March 30, 1948 on the application of the alleged widow herein, this matter came on regularly for hearing before Deputy Commissioner Albert J. Cyr, and issues were joined, and evidence, both oral and documentary, was received and the matter submitted for decision.

XII.

That thereafter, on the 8th day of July 1948, the respondent, Albert J. Cyr, as Deputy Commissioner, filed in his office and served upon the parties to said proceedings a compensation order—Award of Death Benefit; that copy of said compensation order—Award of Death Benefit—is attached hereto as Exhibit A and made a part hereof.

XIII.

That no proceedings for the suspension or setting aside of said compensation order—Award of Death Benefit—filed July 8, 1948, have ever been instituted as provided in subdivision (b) of section 921 of Said Act, or elsewhere, or at all; that under the provisions of Said Act the said order became effec-

tive when filed July 8, 1948, and except for these proceedings to suspend or set aside said order would become final at the expiration of 30 days after said date July 8, 1948.

XIV.

That said compensation order—Award of Death Benefit—is not in accord with law in finding the respondent, Lois G. M. Ross, the alleged widow of the deceased, and John Gary Ross, to be legal dependants upon the deceased on date October 27, 1943, the date of injury herein, and entitled to a death benefit at the rate of $13.13 a week for the alleged widow and $3.75 per week for John Gary Ross, and continuing thereafter until further order of the deputy commissioner, when the evidence shows without contradiction—

(a) that on October 27, 1943, the date of injury herein, the deceased, Kenneth R. Ross, was not married to Lois G. M. Ross, the alleged widow herein, and respondent, and that John Gary Ross was not in being on said date;

(b) when the evidence shows that the deceased, Kenneth R. Ross, had been unemployed for the entire period from October 27, 1943, to and including March 30, 1948, save and except for 30 days work in the year 1945, and could not have had either a dependent wife or a dependent child at the time of the injury herein;

(c) that the prerequisites of a commonlaw mar-

riage, which is the status found in the order complained of herein of the respondent Lois G. M. Ross, did not exist at any time by virtue of the failure of the parties to conform to the prerequisites of a commonlaw marriage as required by law.

XV.

Complainants are informed and believe, and on such information and belief allege that respondents Lois G. M. Ross and John Gary Ross, a minor, will be unable to pay complainants herein the amounts which complainants are required to pay by reason of said compensation order—Award of Death Benefit—and that unless the enforcement of said order be stayed by injunction herein, complainants will suffer irreparable damage and injury.

XVI.

That the complainants have no adequate nor any remedy other than these proceedings, which are brought pursuant to the provisions of section 921 of the Longshoremens and Harborworkers Compensation Act, which provides that if not in accordance with law, a compensation order may be suspended or set aside in whole or in part through injunction proceedings brought by any party in interest against the deputy commissioner making the order.

XVII.

That all of said proceedings before the said deputy commissioner are contained in a file of said

deputy commissioner under the case number DB-14C-8-20, together with the testimony of witnesses heard by the deputy commissioner or by deposition.

That the deputy commissioner should be required to file with the clerk of this Court, at a time to be fixed by the Court, a certified copy of all proceedings had before him, together with all exhibits, transcripts of testimony, letters and documents of every nature and description received by said deputy commissioner in consideration of said claim.

Wherefore, complainants pray that process in due form of law according to the course of this Honorable Court may issue, and that respondents may be cited to appear and answer all and singular the matters hereinbefore set forth, and that the order of said deputy commissioner filed July 8, 1948, be set aside and declared a nullity and that a mandatory injunction be issued herein setting aside and restraining enforcement of said purported order dated July 8, 1948 and that the respondents be permanently enjoined from making, or attempting to make any further orders with respect to said proceedings, and for such other further and different relief as to the Court may seem justified, and for costs incurred herein.

LEONARD, HANNA and
BROPHY,
/s/ DONALD R. BROPHY,
Attorneys for Complainants.

Dated at San Francisco August 7, 1948.

State of California,
City and County of San Francisco—ss.

Donald R. Brophy, being first duly sworn, deposes and says that:

He is one of the attorneys for the complainants herein and makes this verification on their behalf for the reason that there is no officer of the U. S. Fidelity and Guaranty Company residing in the City and County of San Francisco and of the complainants are not within the City and County of San Francisco; that he is more fully in possession of the facts and circumstances related to the matters herein alleged than are complainants; that he has read the foregoing Complaint to Review Compensation Order and for Injunction and knows the contents thereof and that the matters and things therein alleged are true to his own knowledge.

/s/ DONALD R. BROPHY.

Subscribed and sworn to before me this 7th day of August, 1948.

[Seal] /s/ ALFRED D. MARTIN,
Notary Public in and for the City and County of San Francisco, State of California.

Exhibit A

Federal Security Agency Bureau of Workmen's Compensation, 13th Compensation District

Case No. DB-14C-8-20

In the Matter of the Claim for Compensation under the Acts of Congress of August 16, 1941 and December 2, 1942, extending the Longshoremen's and Harbor Workers' Compensation Act.

LOIS G. M. ROSS, widow of Kenneth R. Ross and John Gary Ross, minor child,

Claimants,

against

J. GORDON TURNBULL and SVERDRUP AND PARCEL,

Employer,

U. S. FIDELITY AND GUARANTY COMPANY,

Insurance Carrier.

COMPENSATION ORDER AWARD OF DEATH BENEFIT

Compensation Order having been filed herein on April 26th, 1946 awarding to Kenneth R. Ross compensation benefits for temporary total disability at the weekly rate of $25.00 and the claimant having died as the result of his injury on March 30th 1948 and the claimant herein, Lois G. M. Ross, having filed a claim for death benefit as the Widow of Ken-

neth R. Ross and a hearing having been held on such claim and the case submitted for decision, the Deputy Commissioner makes the following:

Findings of Fact

That the employer and insurance carrier paid to Kenneth R. Ross compensation benefits to and including March 19, 1948, 225 weeks at $25.00 a week amounting to $5625.00; that there is an additional amount of $35.71 due for the period of March 20, 1948 to and including March 29, 1948, 1-3/7 weeks; that Lois G. M. Ross, born May 21, 1921 is the widow of the deceased herein by virtue of a common-law marriage contracted in the State of Colorado and is entitled to death benefit of $13.13 a week beginning with March 30, 1948; that John Gary Ross, born September 2, 1947, is the minor son of Kenneth Ross and Lois G. M. Ross and is entitled to a benefit of $3.75 a weel beginning with March 30, 1948 payable to Lois G. M. Ross as his natural guardian; that the claimant's attorney, Lawrence M. Henry has rendered legal services to the claimant in the prosecution of her claim for which a fee is approved in the amount of $50.00 and a lien granted therefor upon compensation herein awarded.

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, J. Gordon Turnbull and Sverdrup & Parcel, and the insurance carrier, U. S.

Fidelity & Guaranty Company shall pay to the claimant, Lois G. M. Ross, compensation and death benefits as follows:

The sum of $35.71 representing compensation benefits due to Kenneth R. Ross on the date of his death; beginning with March 30, 1948, $16.88 a week in installments each two weeks representing death benefit of $13.13 a week due to the widow and $3.75 a week due to the minor son, John Gary Ross, less however, the sum of $50.00 to be deducted therefrom and paid to the claimant's attorney, Lawrence M. Henry, as his lien for attorney's fee.

Given under my hand at San Francisco, California this 8th day of July, 1948.

ALBERT J. CYR,
Deputy Commissioner,
13th Compensation District.

[Endorsed]: Filed August 7, 1948.

In the United States District Court for the Northern District of California, Southern Division

No. 28237-H

J. GORDON TURNBULL and SVERNDRUP and PARCEL, and U. S. FIDELITY AND GUARANTY COMPANY,

Complainants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation,

Respondent.

MOTION OF RESPONDENT ALBERT J. CYR, DEPUTY COMMISSIONER, TO DISMISS BILL OF COMPLAINT

Now comes the respondent Albert J. Cyr, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District of the Bureau of Employees' Compensation, by his attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, and moves this Honorable Court to dismiss the Bill of Complaint after review of the Compensation Order filed herein, for the following reasons:

1. That the Bill of Complaint filed herein does not state a cause of action and does not entitle plaintiffs to any relief, nor does said Bill of Complaint state a claim against the respondent Albert J. Cyr,

Deputy Commissioner, upon which relief can be granted.

2. That it appears from the Bill of Complaint, including the transcripts of testimony taken before the Deputy Commissioner on file herein, that the findings of fact the Deputy Commissioner in the Compensation Order filed by him on July 8, 1948, complained of in the Bill of Complaint, was supported by evidence and under the law said findings of fact should be regarded as final and conclusive.

3. That it appears from the Bill of Complaint, including said transcripts of testimony, that said Compensation Order complained of herein is in all respects in accordance with law.

4. For such other good and sufficient reasons as may be shown.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ DANIEL C. DEASY,
Asst. U. S. Attorney,
Attorneys for Respondent.

ALBERT J. CYR,
Deputy Commissioner.

[Endorsed]: Filed February 8, 1949.

[Title of District Court and Cause.]

ORDER

Although I find in the file what appears to be a transcript of the proceedings, including the testimony taken before the Deputy Commissioner, and the briefs refer to that testimony, the transcript is not properly before me in the consideration of Respondent's motion to dismiss.

If at the trial it is counsels' intention to offer the transcript and then rest, I suggest that an appropriate stipulation be so made and filed and the case submitted.

The motion to dismiss is denied without prejudice to its renewal at the trial.

Dated: August 19th, 1949.

/s/ DAL M. LEMMON,
U. S. District Judge.

[Endorsed]: Filed August 19, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 28237-H-L

J. GORDON TURNBULL and SVERNDRUP and PARCEL, and U. S. FIDELITY AND GUARANTY COMPANY,

Complainants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation,

Respondent.

STIPULATION FOR RECEIPT OF EVIDENCE AND SUBMISSION OF MOTION TO DISMISS

It is hereby stipulated by and between counsel for complainants and counsel for respondent herein that the entire record of the proceedings before the deputy commissioner as contained in the "Certification of Record" executed by respondent Cyr under date of August 13, 1948, and filed herein on March 15, 1949, consisting of:

1. Claim for Compensation (Form US—262), dated April 19, 1948;

2. Transcript of testimony at hearing before deputy commissioner on June 15, 1948, and Exhibits A, B, C, D, E, and F attached thereto;

3. Compensation Order of respondent Cyr, dated July 8, 1948;

be considered as offered and received in evidence. It is further stipulated that respondent's motion to dismiss may be considered as resubmitted for decision on the evidence introduced pursuant to this stipulation and the pleadings and briefs heretofore filed in the matter.

Dated: September 27, 1949.

LEONARD, HANNA and
BROPHY,
By /s/ IVAN A. SCHWAB,
Attorneys for Complainants.

/s/ FRANK J. HENNESSY,
U. S. Attorney,
Attorney for Respondent.

[Endorsed]: Filed October 6, 1949.

District Court of the United States, Northern District of California, Southern Division

No. 28237-H-L

At A Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 27th day of December, in the year

of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Dal M. Lemmon,
District Judge.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

This case having heretofore been re-submitted to the Court pursuant to Stipulation filed Oct. 6, 1949, It Is Ordered that Respondent's Motion to Dismiss herein is granted.

In the United States District Court for the Northern District of California, Southern Division
No. 28237-H

J. GORDON TURNBULL and SVERNDRUP and PARCEL, and U. S. FIDELITY AND GUARANTY COMPANY,

Complainants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency,

Respondent.

NOTICE OF APPEAL

Notice is hereby given that J. Gordon Turnbull and Sverndrup and Parcel and United States Fidelity and Guaranty Company, complainants in the above-entitled action, hereby appeal to the United

States Court of Appeals for the Ninth Judicial Circuit from that order sustaining motion of the respondents to dismiss the bill of complaint, entered herein on the 28th day of December, 1949, and from the whole of said judgment and each and every part thereof.

LEONARD, HANNA and
BROPHY,
Attorneys for Complainants.
/s/ EDMUND D. LEONARD,
/s/ IVAN A. SCHWAB.

Dated at San Francisco this 17th day of February, 1950.

[Endorsed]: Filed February 17, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL UNDER RULE 75

Complainants hereby designate that the whole of the record, proceeding, and evidence be contained in the record on appeal herein.

LEONARD, HANNA and
BROPHY,
Attorneys for Complainants.
/s/ EDMUND D. LEONARD,
/s/ IVAN A. SCHWAB.

Dated at San Francisco this 17th day of February, 1950.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 17, 1950.

Federal Security Agency, Bureau of Employee's Compensation, 13th Compensation District

Case No. DB-14C-8-20—28237-H

In the Matter of Claim for Compensation under the Acts of Congress of August 16, 1941 and December 2, 1942 extending the Longshoremen's and Harbor Workers' Compensation Act to employees on Public Works of the United States.

LOIS G. M. ROSS, widow of Kenneth R. Ross and John Gary Ross, minor child,

Claimants,

vs.

J. GORDON TURNBULL and SVERNDRUP AND PARCEL,

Employer,

U. S. FIDELITY AND GUARANTY COMPANY,

Insurance Carrier.

CERTIFICATION OF RECORD

This is to certify that I am the duly appointed, qualified and acting Deputy Commissioner of the Federal Security Agency, Bureau of Employees' Compensation under the Longshoremen's and Harbor Workers' Compensation Act and the Defense Bases Compensation Acts (Acts of Congress of August 16, 1941 and December 2, 1942) for the Thirteenth Compensation District, comprising the

State of California and other portions of the United States;

That there has recently been pending before me as said Deputy Commissioner, claim for death benefits transferred to me under said Acts from the 14th Compensation District of Lois G. M. Ross, Widow, and John Gary Ross, Minor Child, against J. Gordon Turnbull and Sverdrup and Parcel, employers and U. S. Fidelity and Guaranty Company, insurance carrier, file no. DB-14C-8-20;

That the attached are originals or true and correct copies of pleadings, transcript of testimony and exhibits in said file, as listed below, being a copy of the entire file therein so far as relevant to a review of the above proceedings, as follows:

1. Form US 262 — Claim for Compensation in Death Case by Widow and/or Children under the Age of Eighteen

2. Transcript of Testimony of Hearing of June 15, 1948 with attached exhibits A, B, C, D, E, F.

3. Copy of Compensation Order awarding death benefits dated July 8, 1948.

Given under my hand at San Francisco, California this 13th day of August, 1948.

/s/ ALBERT J. CYR,
Deputy Commissioner,
13th Compensation District.

United States Employees' Compensation Commission

Case No. DB-14C-8-20

Office of Deputy Commissioner .....
Administering Longshoremen's and Harbor Workers' Compensation Act

Claim for Compensation in Death Case by Widow and/or Children Under the Age of Eighteen

I hereby make claim for compensation arising out of the death of my husband, Kenneth R. Ross, who died on March 30, 1948 at Fitz-Simons Hospital, Denver, as a result of injury sustained on 8-21-43, at Alaska, in the employ of J. Gordon Turnbull & Sverdrup & Parcel & Co., whose address is (blank). Deceased left the following children who were under 18 years of age at the time of his death: Names: John Gary Ross, Date of Birth: Sept. 2, 1947.

These questions should be answered where the widow is claiming compensation.

Widow was born on May 21, 1921 at Shellmouth, Manitoba, Canada.

Widow was married to the deceased on 5th day of October, 1946 at Tiajuana, Mexico by Justice of the Peace.

Last physician or hospital: Capt. Ritter, Fitz-Simons Hospital.

Name of undertaker: Olinger Mortuary. Address: 16th & Boulder St., Denver, Colo.

Amount of undertaker's bill: $100.00. Amount paid, if any: Paid.

By whom paid: Veterans Administration Bureau, Ottawa, Can., thru V. A. in Denver.

Dated this 19th day of April, 1948.

/s/ LOIS G. M. ROSS,

Address: 2053 Galen St., Aurora, Colo.

Affidavit

State of Colorado,
City and County of Denver—ss.

On this 19th day of April, A.D. 1948, personally appeared before me the above-named Lois G. M. Ross and made oath that the answers by Lois G. M. Ross above named and subscribed are true.

[Seal] /s/ ELEANORE E. LANG,
Notary Public.

Address: c/o U. S. Natl. Bank, Denver, Colo.

My Commission Expires November 14, 1951.

Received April 26, 1948.

Federal Security Agency, Bureau of Employees' Compensation, 13th Compensation District

Case No. DB-14C-8-20

In the Matter of the Claim for Compensation Under the Acts of Congress of August 16, 1941 and December 2, 1942, extending the Longshoremen's and Harbor Workers' Compensation Act.

LOIS G. M. ROSS, Widow of Kenneth R. Ross and John Gary Ross, minor child,

Claimants,

vs.

J. GORDON TURNBULL and SVERDRUP & PARCEL,

Employer,

U. S. FIDELITY AND GUARANTY COMPANY,

Insurance Carrier.

COMPENSATION ORDER AWARD OF DEATH BENEFIT

Compensation Order having been filed herein on April 26th, 1946 awarding to Kenneth R. Ross compensation benefits for temporary total disability at the weekly rate of $25.00 and the claimant having died as the result of his injury on March 30th, 1948 and the claimant herein, Lois G. M. Ross, having filed a claim for death benefit as the Widow of Kenneth R. Ross and a hearing having been held on

such claim and the case submitted for decision, the Deputy Commissioner makes the following:

Findings of Fact

That the employer and insurance carrier paid to Kenneth R. Ross compensation benefits to and including March 19, 1948, 225 weeks at $25.00 a week amounting to $5625.00; that there is an additional amount of $35.71 due for the period March 20, 1948 to and including March 29, 1948, 1-3/7 weeks; that Lois G. M. Ross, born May 21, 1921 is the widow of the deceased herein by virtue of a common-law marriage contracted in the State of Colorado and is entitled to death benefit of $13.13 a week beginning with March 30, 1948; that John Gary Ross, born September 2, 1947, is the minor son of Kenneth Ross and Lois G. M. Ross and is entitled to a benefit of $3.75 a week beginning with March 30, 1948 payable to Lois G. M. Ross as his natural guardian; that the claimant's attorney, Lawrence M. Henry has rendered legal services to the claimant in the prosecution of her claim for which a fee is approved in the amount of $50.00 and a lien granted therefor upon compensation herein awarded.

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, J. Gordon Turnbull and Sverdrup & Parcel, and the insurance carrier, U. S. Fidelity and Guaranty Company shall pay to the

claimant, Lois G. M. Ross, compensation and death benefits as follows:

The sum of $35.71 representing compensation benefits due to Kenneth R. Ross on the date of his death; beginning with March 30, 1948, $16.88 a week in installments each two weeks representing death benefit of $13.13 a week due to the widow and $3.75 a week due to the minor son, John Gary Ross, less however, the sum of $50.00 to be deducted therefrom and paid to the claimant's attorney, Lawrence M. Henry, as his lien for attorney's fee.

Given under my hand at San Francisco, California this 8th day of July, 1948.

/s/ ALBERT J. CYR,
Deputy Commissioner,
13th Compensation District.

AJC:mh:el

[Endorsed]: Filed March 15, 1949.

Federal Security Agency
Bureau of Employees' Compensation

Before Albert J. Cyr, Deputy Commissioner

Claim DB-14C-8-20
June 15, 1948

In the Matter of the Claim for Compensation Under the Longshoremen's and Harbor Workers' and Defense Bases Act as Extended by Acts of Congress of August 16, 1941, and December 2, 1942.

LOIS G. M. ROSS,

Claimant,

vs.

J. GORDON TURNBULL and SVERDRUP & PARCEL,

Employer,

U. S. FIDELITY AND GUARANTY COMPANY,

Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING

Now on this Tuesday, June 15, 1948, at 2:00 p.m. in the Petit Jury Room No. 337, of the Denver Post Office Building, Denver, Colorado, this matter came on for hearing:

Before: Albert J. Cyr, Deputy Commissioner of the 13th Compensation District.

Appearances: Claimant present in person, and by her attorney, Lawrence M. Henry, Esq., 618 Symes Building, Denver, Colorado.

Raymond A. Wagner, Esq., attorney for defendants, 929 University Building, Denver, Colorado.

Whereupon the following proceedings were had, to-wit:

Commissioner: This will be a hearing on application filed by Mrs. Lois G. M. Ross, as the widow of Kenneth R. Ross who died March 30, 1948 from, according to the death certificate tuberculous meningitis.

At the time of his death, Mr. Ross was on compensation under the defense bases act, because of a tuberculous condition, which originated during the period of employment in the Yukon Territory in the Western Dominion of Canada.

This tuberculosis had been accepted as compensible, and Mr. Ross received compensation from October 27, 1943 to March 19, 1948; 225 weeks at $25.00 a week; total amount $5,625.00.

The claim before us today is Mrs. Ross' claim as the widow of Kenneth Ross. [1*]

LOIS G. M. ROSS

a witness on behalf of claimant, being first duly sworn, testified as follows:

Interrogation

By Commissioner:

Q. Give us your full name for the record, please?

A. Lois Gwendoline Muriel Ross.

*** Page numbering appearing at bottom of page of original Reporter's Transcript.**

(Testimony of Lois G. M. Ross.)

Q. And your present address?

A. 2053 Galena Street, Aurora.

Q. Is that going to be more or less your permanent address, for the time being? A. Yes.

Q. You were married to Kenneth Ross?

A. Yes, sir.

Q. And the date of the marriage was October 5, 1946?

Mr. Henry: If your Honor please, we will have to rely on the common-law marriage to establish her claim as widow in this matter. We are ready to establish it from the reputation in the community as being man and wife, by documentary evidence, and by testimony of witnesses.

Commissioner: You take the witness then.

Direct Examination

By Mr. Henry:

Q. Are you the wife of Kenneth Robert Ross?

A. Yes. [2]

Q. When did you and Mr. Ross come to Denver, Colorado? A. In June, 1947.

Q. Where did you live in Denver, Colorado?

A. 1933 Downing.

Q. And during your stay in Colorado, did you and Kenneth Robert Ross consider yourselves as man and wife, and was there such an agreement?

A. Yes.

Q. What was the name of your landlady at the address previously given? A. Mrs. Reid.

(Testimony of Lois G. M. Ross.)

Q. Pardon? A. Mrs. Reid.

Q. Do you know her first name?

A. Alice, I believe it is.

Q. Did you and Mr. Ross have any common friends other than your landlady who might know of your relationship as man and wife?

A. Yes.

Q. Could you name one or more?

A. I could name several, but one, Mr. Jesse Craft.

Q. Do you know his address?

A. 950 Acoma Street.

Q. Are both Mrs. Reid and Mr. Craft here today? A. Yes. [3]

Q. Were you and Mr. Ross the parents of a child, the name of which was given as John Gary Ross? A. Yes, John Gary.

Q. Where was that child born?

A. In St. Luke's Hospital, Denver, Colorado.

Q. When was the child born?

A. September 2, 1947.

Q. I believe there is already in evidence a copy of this birth certificate. When the child was born, were you admitted to the hospital as Mrs. Ross?

A. Yes.

Mr. Henry: If your Honor please, at this time we would like to introduce a record; certified letter of St. Luke's Hospital, indicating Mrs. Ross was admitted to that hospital on September 2, 1947, and was discharged from the hospital September 8, 1947,

(Testimony of Lois G. M. Ross.)

after the baby had been born at 8:10 a.m. September 2, 1947. That the records there indicate Mr. Kenneth Ross was the husband of the patient, and the legitimate father of the baby. Attached to that record, or attached to that letter, as stated in the letter, is a copy of the patient's ledger with the information that was given to their admitting employee.

(Document handed to Mr. Wagner.)

Mr. Wagner: This does not indicate that Mr. Ross in any way indicated he was the husband. I thought perhaps the certificate would indicate that he procured admission to the hospital [4] as the husband.

Mr. Henry: Mrs. Ross could testify to that, however, I was under the impression that admission record would show some signature.

Witness: But I don't——

Q. That is the only record, is that true?

A. Well there is a duplicate of that sheet.

Mr. Wagner: Of course we would have to offer this in evidence on the basis it does not properly show any admission on his part that he was the husband of the claimant.

Commissioner: I will accept the records discussed, as Exhibit "A," and your objections noted to it and the reasons therefor, are part of the record.

(Testimony of Lois G. M. Ross.)

EXHIBIT "A"

Saint Luke's Hospital
Denver 5, Colorado

June 15, 1948.

To Whom It May Concern:

This is to certify that Mrs. Lois Ross was admitted to St. Luke's Hospital, Denver, Colorado, as a maternity patient on September 2, 1947, at 1:35 a.m., patient admission #172604, and was discharged from the hospital September 8, 1947 at 11:20 a.m. A baby boy was born to Mrs. Ross at 8:10 a.m., September 2, 1947.

Our records indicate that Mr. Kenneth Ross was the husband of the patient and the legitimate father of the baby.

Attached please find a copy of the patient's ledger with the information at the top that was given to our admitting employee.

Yours very truly,

/s/ ROY R. PRANGLEY,
Superintendent.

Subscribed and sworn to before me this 15th day of June, 1948.

[Seal] /s/ R. K. MORTENSEN,
Notary Public.

My Commission expires May 4, 1949.

(Testimony of Lois G. M. Ross.)

LMT FOR RJC	#172609 Babe Boy Born 9-2-47 8.10 am Day Tuesday
Rm. 132 Rate 6.50	Name—Ross, Mrs. Lois Age 25
To be paid by Husband: Mr. Kenneth Ross	Address—1933 Downing Phone MA 9772
	Phys. Dr. E. E. Taylor Interne Dr. Jardine Obst Dept
Employer Writer	Date admitted 9-2-47 Time 1.35 am Adm. No. 172604
	Date discharged 9-8-47 Time 11:20 am

Date	Description	Charges	Credits	Balance
Sep 2	Room	6.50		
Sep 2	Drugs	.30		
Sep 2	Lab	5.00		
Sep 2	Tel—	.05		11.85
Sep 3	Room	6.50		
Sep 3	Drugs	.75		
Sep 3	Delv	15.00		
Sep 3	Dresng	5.00		
Sep 3	Anes	10.00		
Sep 3	Drugs	.10		
Sep 3	Tel—	.05		49.25
Sep 4	Room	6.50		
Sep 4	Drugs	.75		56.50
Sep 5	Room	6.50		63.00
Sep 6	Room	6.50		
Sep 6	Drugs	.35		69.85
Sep 7	Room	6.50		76.35
Sep 8	Room	3.25		
Sep 8	Tel—	.10		
Sep 8	Drugs	.50		
Sep 8	Pencln	8.00		
Sep 8	Drugs	.15		
Sep 8	Drugs	.20		
Sep 8	Tx	.18		88.73
Sep 8	Cash		78.35—	10.38
Sep 8	Disc		1.35—	9.03
Jun 15	Cash		9.03—	.00

THE ST. LUKE'S HOSPITAL ASSOCIATION

[In ink—Duplicate Copy]

(Testimony of Lois G. M. Ross.)

Mr. Henry: Also, as being indicative of their reputation among their friends, I should like to introduce into evidence, if there is no objection, letters received from individuals addressed to Mr. and Mrs. Ross at the address stated by Mrs. Ross, as being the husband of the claimant at the time they were living in Denver.

Mr. Wagner: I wouldn't know until I see the letter.

Q. May I have these letters——

A. They are not from Denver.

Q. They are addressed to you in Denver?

A. Some of them are, and some in Colorado Springs.

Q. May I have them marked? (Witness hands documents [5] to counsel.) I would like to offer the envelopes only, and withdraw the messages inside, if you have no objection.

Mr. Wagner: I would object to this on the basis, it does not in any way connect the claimant Lois Ross with Mrs. Ken Ross.

Mr. Henry: I offer them only upon the basis of indication the deceased was married, to Mrs. Ross, claiming his marriage to her, as merely supporting evidence that he was married to some one.

Commissioner: Will you pick them out? (Documents handed to witness.)

Q. Mrs. Ross, upon the decease of your alleged husband Kenneth Ross, did you handle the arrangements for his funeral?

(Testimony of Lois G. M. Ross.)

A. Yes. I have the receipt.

Q. You do have a receipt? A. Yes.

Q. For funeral expenses paid for by yourself?

A. Well I paid for the vault and the burial was through the Veterans' Adminstration.

Q. How was the funeral paid?

A. Through the Veterans' Administration.

Mr. Henry: I would like now to offer in evidence, the receipt from the Crown Hill Cemetery Association, from Mrs. Lois Ross as the wife; she paid $45.00 for the vault, on April 1, 1948. [6]

Mr. Wagner: Of course I would object on the same grounds. It doesn't prove any marriage between Lois Ross and Kenneth Ross.

Commissioner: It will be accepted in evidence as Exhibit "B" and the objection of the defendants noted.

EXHIBIT "B"

Crown Hill Cemetery Association
324 Denham Building

No. 136694
Date: 4-1-48

Received of Mrs. Lois Ross
Address 2053 Galena
On acct. (vault).
$45.00—Forty-five & no 100.

CROWN HILL CEMETERY ASSOCIATION,
By /s/ [Indistinguishable.]

(Testimony of Lois G. M. Ross.)

Q. Mrs. Ross, did you at all times during your stay in Denver, and Colorado, while Mr. Ross was living, and after his decease, hold yourself out as being married to Kenneth Ross?

A. Yes. I have lots of letters showing I was.

Q. I think that is all the testimony I want to offer from Mrs. Ross.

Commissioner: I have a question.

Interrogation

By Commissioner:

Q. Mrs. Ross, in the burial expenses you had in connection with the burial and funeral and so on, was this $45.00 used for the purchase of the vault?

A. Yes.

Q. All other expenses were paid by the Veterans' Bureau? A. Yes.

Mr. Henry: May I ask another question?

Further Direct Examination

By Mr. Henry:

Q. Where did Mr. Ross die? [7]

A. Fitzsimons Hospital.

Mr. Henry: At this time I would like to offer into evidence a letter from Department of the Army, Fitzsimons General Hospital, dated the 1st of April, 1948 to Mrs. Lois Ross, expressing regret upon the death of her husband, the late Kenneth R. Ross, and signed by R. C. Warner, 1st Lieutenant, Medical Service Corps.

(Document handed to Mr. Wagner.)

(Testimony of Lois G. M. Ross.)

Mr. Wagner: I would make the same objection, if this is offered to prove the relationship of husband and wife.

Commissioner: It is received as Exhibit "C," with the objection noted.

EXHIBIT "C"

Department of the Army
Fitzsimons General Hospital
Denver 8, Colorado

RCW:ILR

In Reply Refer to Medeo-R 201-Ross, Kenneth R. (BVA)

1 April 1948

Mrs. Lois Ross
2053 Galena Street
Aurora, Colorado

Dear Mrs. Ross:

May we express our sincere sympathy to you in the loss of your husband, the late Kenneth R. Ross, who died March 30, 1948, while a patient in this hospital.

It will perhaps be a source of comfort to you to know that he received every possible care and attention during his illness here.

Sincerely yours,

/s/ R. C. WARNER,
1st Lieutenant, Medical Service Corps, Asst. Registrar.

(Testimony of Lois G. M. Ross.)

Mr. Henry: I would like to call Mrs. Reid.

Commissioner: Just a second. I will put in evidence, Exhibit "D," a certified copy of the death certificate, and also, Exhibit "E," certified copy of birth certificate of John Gary Ross. You may cross-examine Mr. Wagner.

T. OF COMMERCE
AU OF THE CENSUS
V.S. No. 10

STATE OF COLORADO
STANDARD CERTIFICATE OF DEATH
BUREAU OF VITAL STATISTICS

State File No. 3327
Registrar's No. 74 Dist. I

PLACE OF DEATH:
County Adams
City or town Denver (If outside city or town limits, write RURAL)
Name of hospital or institution: Fitzsimons General Hospital
(If not in hospital or institution write street number or location)
Length of stay: In hospital or institution 26 da (Specify whether
this community min., months or days)

2. USUAL RESIDENCE OF DECEASED:
(a) State California (b) County San Bernardino
(c) City or town Redlands (If outside city or town limits, write RURAL)
(d) Street No 908 Ohio (If rural give location)
(e) If foreign born, how long in U. S. A.? ..... years

1. FULL NAME ROSS, Kenneth R.

3 (a) If veteran, name war WW II
3 (c) Social Security No. -
5. Color or race White
6(a) Single, widowed, married, divorced Married
6 (c) Age of husband or wife if alive ..... years
Sex Male
6 (b) Name of husband or wife Lois Ross
Birth day of deceased January 15 1917 (Month) (Day) (Year)

AGE: Years 31 Months 2 Days 15 If less than one day ... hr. ... min.

Birthplace LaJunta (City, town, or county) Colorado (State or foreign country)
9. Usual occupation None
10. Industry or business -
12. Name Reuben T. Ross
13. Birthplace Neodesha (City, town, or county) Kansas (State or foreign country)
14. Maiden name Anne M. Swanson
15. Birthplace Stillwater (City, town, or county) Oklahoma (State or foreign country)

16 (a) Informant's own signature Hospital Record
(b) Address Fitzsimons GH, Denver, Colorado
17 (a) Burial (Burial, cremation or removal) (b) Date thereof April 2 1948 (Month) (Day) (Year)
(c) Place: burial or cremation Crown Hill Cemetery Denver, Colorado
18 (a) Signature of funeral director M Clinger Mortuary
(b) Address Denver, Colorado
19 (a) April 8, 1948 (Date received by local registrar) (b) Viola Pearce (Registrar's signature)

MEDICAL CERTIFICATION

20. Date of death: Month March day 30 year 1948. hour 3 minute 00 AM
21. I hereby certify that I attended the deceased from March 4 1948, to March 30 1948.; that I last saw h in alive on March 30 1948.; and that death occurred on the date and hour stated above.

	Duration
Immediate cause of death: Tuberculous meningitis	49 da
Due to: Chronic general miliary tuberculosis	3 mo
Due to: Pulmonary tuberculosis	6½ yr
Other conditions	
Major findings of operations	
On autopsy Same as above	

PHYSICIAN: Underline the cause which death should be charged statistically

22. If death was due to external causes, fill in the following:
(a) Accident, suicide, or homicide (specify) .....
(b) Date of occurrence .....
(c) Where did injury occur? (City, town, or county) (State)
(d) Did injury occur in or about home, on farm, in industrial place, in public place?
While at (Specify) (e) Means of injury .....
23. Signature Charles Fox, Captain (M.D. or other) MC
Address Fitzsimons GH, Denver, Colo Date signed 4-6-

IT D

STATE OF COLORADO, SS:

I hereby certify that the above is a true, full and correct copy of the original certificate, in my custody

R. L. Pierce M.D.

Viola C. Myers

DEPT. OF COMMERCE
BUREAU OF CENSUS

STATE OF COLORADO
STANDARD CERTIFICATE OF BIRTH

State File No. 24517
Registrar's No. 853 Dist. 01

1. PLACE OF BIRTH:
County Denver
City or town Denver (If outside city or town limits write RURAL)
Name of hospital or institution: St Luke's Hospital (If not in hospital or institution give street number or location)

2. USUAL RESIDENCE OF MOTHER:
(a) State Colorado
(b) County Denver
(c) City or town Denver (If outside city or town limits write RURAL)
(d) Street No. 1933 Downing St (If rural give location)

1. Full name of child John Gary Ross
4. Date of birth Sept. 2, 194 (Month) (Day) (Year)
5. Sex: M 6. Twin or triplet ____ If so-born 1st, 2nd or 3rd ____

FATHER OF CHILD
7. Full name Kenneth Robert Ross
8. Residence 1933 Downing St.
9. Color or race W 10. Age at time of this birth 30 yrs.
11. Birthplace La Junta Colorado (City, town or county) (State or foreign country)
12. Usual occupation Writer
13. Industry or business Writing

MOTHER OF CHILD
14. Full maiden name Lois Gwendoline Ross
15. Residence 1933 Downing St
16. Color or race W 17. Age at time of this birth 26 yr
18. Birthplace Shellmouth, Manitoba, Canad (City, town or county) (State or foreign country)
19. Usual occupation Registered Nurse
20. Industry or business Private Duty

21. Children born to this mother at the time of this birth:
(a) How many other children of this mother are now living, at the time of this birth? 0
(b) How many other children were born alive but are now dead, at the time of this birth? 0
(c) How many children were born dead, at the time of this birth? 0

22. I hereby certify that I knew of / attended the birth of this child who was born alive at the hour of 9:10 m. on the date above stated and that the information given was furnished by L. D. Ross, related to this child as mother

23. Date received by State / local registrar 9-12-47
24. Registrar's own signature E Luella C Myers
25. Date on which given name added ____ by ____ Registrar

Attendant's own signature E Luella C Myers M. D., or midwife
Date signed 9-5-47
Address Republic Bldg.

STATE OF COLORADO, SS:

I hereby certify that the above is a true, full and correct copy of the original certificate, in my custody as [illegible] in my office.

Witness my hand and official seal, this 12th day of Sept. A. D. 19[illegible]

R. L. Chiero, M.D.
STATE REGISTRAR OF VITAL STATISTICS

K. A. Martin
[illegible] OF VITAL STATISTICS

(Testimony of Lois G. M. Ross.)

Cross-Examination

By Mr. Wagner:

Q. In the claim for compensation dated April 19, 1948 it appears that you were married at Tiajuana, Mexico, on the 5th of October, 1946, before a Justice of the Peace. Is that correct?

A. I would like to withdraw that statement.

Q. That isn't so? A. No. [8]

Q. This was sworn to before a notary public was it not? A. Yes.

Q. Do you have any where, any copy of an application, or letter signed by Kenneth Ross, in which he stated that he was married? A. To me?

Q. Yes. In some of these applications, it requires an answer as to whether a man is married, single, and so forth. Now he did sign one in 1944, and of course he said he was single. Of course that happened before the time that we are talking about now, and I was wondering if you had any similar paper or application—— A. No.

Q. ——or anything in which that question was answered by him, and which he signed?

A. The only thing is, they admitted me to the hospital before the baby was born, and this clerk got the information from him.

Q. Were you able to give the clerk anything there?

A. No, apparently it had been decided, I don't know. He has the initials; the clerk's initials were on the admission blank.

(Testimony of Lois G. M. Ross.)

Q. Were they able to trace him, the hospital people, to determine who he was?

A. No, they said; it was at 1:30 at night, and probably [9] a substitute clerk or something.

Q. These papers which your attorney has offered in evidence are the sole written evidence of the marriage? A. Yes.

Q. That is all.

Interrogation

By Commissioner:

Q. Mrs. Ross, you never went through any kind of a marriage ceremony? A. No.

Q. What were the circumstances under which you started living together as husband and wife? This is personal, but we have to get personal sometimes. A. As you know, he was sick.

Q. How? A. He was sick——

Q. Yes.

A. ——and he didn't have any one to look after him, and so——

Q. Did you start to look after him?

A. Well, yes.

Q. And about what time was that?

A. That was in October in '46.

Q. When he was still in California?

A. Yes. [10]

Q. Was he in a hospital at that time?

A. No.

Q. In a sanitarium? A. No.

Q. He was living in Monrovia?

(Testimony of Lois G. M. Ross.)

A. He was in a sanitarium there. He left, he was in Redlands.

Q. Are you from Redlands yourself?

A. No.

Further Cross-Examination

By Mr. Wagner:

Q. Where did you first meet Mr. Ross?

A. In Canada when he was in the hospital with us.

Q. What hospital?

A. Fort Sand—Saskatchewan.

Q. Was there any break in that relationship from October 1946, until the time of Mr. Ross' death? A. No.

Commissioner: As I understand it, you met him when he was in a sanitarium in Saskatchewan, and you came to see him in California in 1946?

Witness: That is right.

Commissioner: And you started living together about the time you got down to California?

A. Yes. **[11]**

Commissioner: And you have been living together from then until his death?

Witness: That is right.

Commissioner: That is all.

Mr. Wagner: How many children do you have?

Witness: One son.

Mr. Wagner: And how old is the child now?

Witness: He is nine and a half months.

(Testimony of Lois G. M. Ross.)

By Commissioner:

Q. You had never been married before had you?

A. No.

Q. How about Mr. Ross; he had never been married either? A. No.

Q. When did you come to Colorado with Mr. Ross? A. In June.

Q. June, 1947? A. '47.

Q. And you stayed in the State of Colorado with him until his death in March, 1948?

A. That is right.

Mr. Wagner: When was Mr. Ross admitted to Fitzsimons Hospital?

Witness: March 4th.

Mr. Wagner: Of this year? [12]

Witness: Yes. He was in a sanitarium for a month in Colorado Springs.

Mr. Henry: Were you with him in Colorado Springs? A. Yes.

Mr. Wagner: And the child was born in Colorado Springs? A. No, he was born in Denver.

Mr. Wagner: Oh, in Denver.

ALICE REID

a witness on behalf of claimant, being first duly sworn, testified as follows:

Interrogation

By Commissioner:

Q. What is your name? A. Mrs. Reid.

Q. Your first name? A. Alice.

(Testimony of Alice Reid.)

Q. Alice Reid? A. Yes.

Q. And your address? A. 1933 Downing.

Q. That is in Denver? A. Yes.

Direct Examination

By Mr. Henry:

Q. Mrs. Reid, what is your occupation or means of [13] livelihood?

A. We have an apartment house.

Q. And what is the address of that?

A. 1933 Downing.

Q. Did you manage that apartment house between the days of June of 1947 and March of 1948?

A. Yes.

Q. During that time, did you ever become acquainted with the lady here to your left, known as Mrs. Ross? A. Yes, sir.

Q. Would you tell the circumstances of your acquaintanceship with her?

A. When Mrs. Ross came, it was the latter part of May. Mr. Ross was to come a few weeks later; it was in June.

Q. Of what year? A. Of '46.

Q. '46?

A. Yes, sir, she was a nurse; his nurse, and she stayed until in August of '47, and Mr. Ross joined her there in June. She came just a few days before he got there.

Q. And during that period that you have just mentioned, did you at all times understand that Mr. and Mrs. Ross were married to each other?

(Testimony of Alice Reid.)

A. Yes.

Q. Did they tell you they were man and wife?

A. Well it was my understanding before he arrived, Mr. Ross was coming, and that was the means of the explanation, the day he came, of course.

Q. Was he introduced to you as the husband of——

A. She was on duty that night, and he came to the house and was introduced to me. She was on duty at the hospital.

Q. He introduced himself? A. Yes.

Q. Did he at that time say he was related to Mrs. Ross? A. Yes.

Q. What did he say?

A. He said he was the husband.

Q. The husband of the lady that took that apartment at 1933 Downing? A. Yes.

Q: How did they pay their rent?

A. By the month.

Q. By the month?

A. Uh huh. I say, it was by the month; it was a monthly basis, it wasn't paid always by the month, but it was a monthly rate.

Q. And in receipting for that money, to whom were the receipts made?

A. Well, to Mrs. Ross.

Q. To Mrs. Ross? [15] A. Yes.

Q. Do you know the general reputation in the community as to their relationship, based upon your knowledge of the two, and the neighbors?

(Testimony of Alice Reid.)

A. Well they were very fine people as far as—I had never known them until they came there, but while there they were very fine.

Q. But with relation to their mutual associations, what was the understanding that the neighborhood had, concerning that?

A. As man and wife. Is that what you mean?

Q. Yes, as man and wife. The other members of your apartment house too, understood Mr. and Mrs. Ross were married? A. Yes.

Q. I believe that is all.

Commissioner: When Mrs. Ross came to you and applied for an apartment, how did she introduce herself? As Mrs. Ross?

Witness: As Mrs. Ross, yes.

Commissioner: She never gave you any other name but Mrs. Ross?

Witness: No.

Mr. Henry: We do have some rental receipts made out to Mr. and Mrs. Ross, which I think are not necessary.

Mr. Wagner: I don't think there is anything further I can ask. [16]

Commissioner: You are excused, thank you.

Mr. Henry: I would like to call Mr. Craft.

JESSE CRAFT

a witness called on behalf of claimant, being first duly sworn testified as follows:

Interrogation

By Commissioner:

Q. What is your name? A. Jesse Craft.

Q. And your address? A. 930 Acoma.

Q. That is in Denver? A. Yes.

Direct Examination

By Mr. Henry:

Q. Mr. Craft, are you acquainted with Mrs. Lois Ross? A. I am, yes, sir.

Q. How long have you known her?

A. Well it has been several months. I wouldn't care to state just what month they started.

Q. All right. Would you state how you came to know her?

A. I operated a service station at 635 East 20th Avenue and Mr. Ross traded with me.

Commissioner: Mr. Ross traded with you?

Witness: Yes. [17]

Q. Did you know both Mr. and Mrs. Ross?

A. That is right.

Q. Did they appear at your service station together at any time?

A. Yes, sir, quite frequently

Q. And did you become rather closely acquainted with either or both of them?

A. Well, friendly, yes. They were very friendly people.

(Testimony of Jesse Craft.)

Q. And with relation to the marital status of each; what was your impression during this time?

A. I assumed they were married. In fact, I was introduced to her as his wife, by him.

Q. Did Mr. Ross introduce you to this Mrs. Ross as his wife? A. That is correct.

Q. And did those whom you knew, that also knew Mr. and Mrs. Ross, understand they were married? In other words, what was the reputation they had in the community, if you know it?

A. I don't know it. As far as I am concerned, they were married. That is all I care to state.

Q. Did they associate together enough for you to establish the idea they were married?

A. That is right, yes, sir.

Q. I believe that is all. [18]

Cross-Examination

By Mr. Wagner:

Q. Over how long a period of time did they come to your station?

A. Well, several months. It was warm weather, sometime that summer he started coming in.

Q. In 1947? A. Yes, sir.

Q. That is all.

Commissioner: That is all.

Mr. Wagner: Could I ask Mrs. Ross a question?

LOIS G. M. ROSS

recalled to the stand for further

Cross-Examination

By Mr. Wagner:

Q. Was there some particular reason why you didn't have a marriage ceremony?

A. There was, but I don't know what it is.

Q. You don't? A. No.

Q. Had you ever mentioned the subject to him?

A. Yes.

Q. And what did he say?

A. He said we would go to Mexico and get married.

Q. He had the intention of going through a ceremony? [19] A. Yes.

Q. Did he keep postponing it?

A. No, he was too sick to go.

Commissioner: You know of no reason why a marriage ceremony could not have been performed in the states?

Witness: No, I don't.

Mr. Henry: Even though you anticipated sometime, entering into a ceremonial marriage, did you and Mr. Ross, by his actions, did you consider yourselves as married?

A. Yes. We considered ourselves as married.

Mr. Wagner: You never really gave up the idea of having a ceremony sometime or other, did you?

A. No.

Mr. Wagner: That is all.

(Testimony of Lois G. M. Ross.)

Commissioner: Are you a citizen of the United States?

Witness: No, not yet.

Commissioner: You are a citizen of Canada?

Witness: Yes.

Commissioner: Do you expect at any time to return to Canada?

Witness: No.

Commissioner: You have no intention of returning to Canada?

Witness: No.

Commissioner: All right, that is all. [20]

Mr. Henry: That is all, as far as the testimony is concerned.

Chapter 107 of the 1935 Colorado Statutes Annotated:

Section 1. "Marriage is considered in law a civil contract, to which the consent of the parties is essential."

Then citing our case law, I would like to cite Taylor vs. Taylor, 50 Pacific, 1049; 10 Colorado Appeals, 303, to the effect: "Under the laws of Colorado marriage is a civil contract, and while the statutes provide for licenses, certificates, record and authority to perform the marriage ceremony, a marriage is not void because it is not contracted in accordance with these provisions or was contracted in violation of them."

In Klipfel's Estate vs. Klipfel, 92 Pacific, 26; 41 Colorado, page 40, the court said: "A marriage

contract between parties capable of contracting, possessing clearly, the one essential prerequisite of mutual consent, followed by cohabitation as husband and wife, and such other attendance circumstances as are necessary to constitute the common-law marriage may be valid and binding although no solemnization has been attempted."

Then with relation to whether or not the anticipated ceremonial marriage would invalidate the present contract, which is necessary to a common-law marriage, the Colorado court in Moffat Coal Company, vs. Industrial Commission, 118 Pacific 2nd, 769; 108 Colorado, 388, a workmen's compensation case, stated: "There is nothing inconsistent in fixing the status of marriage per verba de praesenti and agreeing that the relationship then constituted shall be publicly solemnized at a future date."

Commissioner: All right. Off the record.

I am accepting in evidence a group of envelopes, consisting of seven, as Exhibit "F," addressed to both Mr. and Mrs. Kenneth Ross.

EXHIBIT F

[7 envelopes addressed to Mr. and Mrs. Ross.]

Case submitted.

(2:47 p.m. case submitted.)

CERTIFICATE

State of Colorado,
City and County of Denver—ss.

I, C. F. Jeffers, a Certified Shorthand Reporter of Denver, Colorado, do hereby certify that the above and foregoing pages, 1 to 27, is a full, true and correct transcript of my notes taken in the matter of Lois G. M. Ross, Claimant, against J. Gordon Turnbull & Sverndrup & Parcel, Employer, and U. S. Fidelity & Guaranty Company, Carrier, Claim DB-14C-8-20, together with the portions of exhibits ordered copied by Deputy Commissioner, at hearing in Denver, Colorado, Tuesday, June 15, 1948.

Dated this 19th day of June, A.D. 1948, at Denver, Colorado.

/s/ C. F. JEFFERS, C.S.R.,
1558 Marion Street,
Denver 6, Colorado.

Exhibits Attached to Original Transcript.

Received and filed June 23, 1948.

In the District Court of the United States
for the Northern District of California

No. 28237 H-L

J. GORDON TURNBULL and SVERNDRUP AND PARCEL, and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Complainants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, FEDERAL SECURITY AGENCY, et al.,
Respondents.

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, or a true and correct copy of an order entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

Complaint to Review Compensation Order and for Injunction.

Motion of Respondent Albert J. Cyr, Deputy Commissioner, to Dismiss Bill of Complaint.

Certificate of Record Case No. DB-14C-8-20 Contains Claim for Compensation (Form US-262), dated April 19, 1948.

Compensation Order of Respondent Albert J. Cyr, dated July 8, 1948.

Transcript of Testimony at hearing before deputy commissioner on June 15, 1948, and Exhibits A, B, C, D, E and F, attached thereto.

Order.

Stipulation for Receipt of Evidence and Submission of Motion to Dismiss.

Minute Order of December 27, 1949 — Order Granting Respondent's Motion to Dismiss.

Notice of Appeal.

Designation of Contents of Record on Appeal Under Rule 75.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 8th day of March, A.D. 1950.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12493. United States Court of Appeals for the Ninth Circuit. J. Gordon Turnbull, Sverndrup and Parcel and United States Fidelity and Guaranty Company, Appellants, vs. Albert J. Cyr, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency and Lois G. M. Ross, alleged widow of Kenneth R. Ross, and John Cary Ross, a minor child, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 8, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Judicial Circuit

No. 12493

J. GORDON TURNBULL and SVERNDRUP and PARCEL, and U. S. FIDELITY AND GUARANTY COMPANY,

Appellants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency,

Appellees.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF.

Appellants intend to rely on the following points on appeal:

(1) That the District Court erred in granting the motion to dismiss the complaint for an injunction against the enforcement of the Compensation Order—Award of Death Benefit entered by the appellee Cyr because said Compensation Order—

Award of Death Benefit was not in accordance with law in that there was no substantial evidence in the proceedings before appellee Cyr to support the finding that the claimant Lois G. M. Ross is the widow of the deceased employee by virtue of a common-law marriage contracted in the State of Colorado.

(2) That the District Court also erred in granting the motion to dismiss because said Compensation Order—Award of Death Benefit was not in accordance with law in that the claimant Lois G. M. Ross is not included in the class of persons entitled to payment of a death benefit under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. Code 901 et seq.) and the Defense Bases Act (42 U. S. Code 1651-1654).

(3) That the District Court also erred in granting the motion to dismiss because said Compensation Order—Award of Death Benefit was not in accordance with law in that the claimant John Gary Ross is not included in the class of persons entitled to payment of a death benefit under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. Code 901 et seq.) and the Defense Bases Act (42 U. S. Code 1651-1654).

Appellants request that the record as certified to the Clerk of the United States Court of Appeals

for the Ninth Judicial Circuit be printed in its entirety.

Dated: March 22, 1950.

LEONARD, HANNA &
BROPHY,

/s/ EDMUND D. LEONARD,

/s/ IVAN A. SCHWAB,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 23, 1950.

No. 12493

United States
Court of Appeals
for the Ninth Circuit.

J. GORDON TURNBULL, SVERNDRUP AND PARCEL and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, FEDERAL SECURITY AGENCY and LOIS G. M. ROSS, alleged widow of Kenneth R. Ross, and JOHN CARY ROSS, a minor child,

Appellees.

SUPPLEMENTAL
Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12493

United States
Court of Appeals
for the Ninth Circuit.

J. GORDON TURNBULL, SVERNDRUP AND PARCEL and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, FEDERAL SECURITY AGENCY and LOIS G. M. ROSS, alleged widow of Kenneth R. Ross, and JOHN CARY ROSS, a minor child,

Appellees.

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**Appeal from the United States District Court,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the United States Court of Appeals
for the Ninth Circuit
No. 12,493

J. GORDON TURNBULL, SVERNDRUP and PARCEL and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellants.

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, FEDERAL SECURITY AGENCY, LOIS G. M. ROSS and JOHN CARY ROSS, a Minor Child,

Appellees.

Appeal From the United States District Court for the Northern District of California, Southern Division.

Aug. 15, 1950

Before MATHEWS, STEPHENS and ORR, Circuit Judges.

PER CURIAM OPINION

This appeal is from an order which granted a motion to dismiss a complaint, but did not dismiss it. Such an order is not a final decision, within the meaning of 28 U.S.C.A. § 1291, and is not appeal-

able. Prickett v. Consolidated Liquidating Corp., 9 Cir., 180 F. 2d 8. See, also, City and County of San Francisco v. McLaughlin, 9 Cir., 9 F. 2d 390; Wright v. Gibson, 9 Cir., 128 F. 2d 865; Tee-Hit-Ton-Tribe of Tlingit Indians v. Olson, 9 Cir., 144 F. 2d 347; Peoples Bank v. Federal Reserve Bank, 9 Cir., 149 F. 2d 850; Cashion v. Bunn, 9 Cir., 149 F. 2d 969. The appeal is, therefore, dismissed. Mandate to issue forthwith.

[Endorsed]: Per Curiam Opinion. Filed Aug. 15, 1950. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between counsel for appellants and counsel for appellee that the clerk may have prepared, at the expense of appellants, a printed supplemental transcript of record consisting of the judgment of dismissal entered herein on September 13, 1950, and the notice of appeal filed on September 13, 1950; that the appeal may be considered upon the record on the appeal heretofore taken as so supplemented, and the briefs filed on the said appeal so previously taken; and that the case may be restored to the calendar for argument immediately upon the receipt of the supplemental transcript of record by the clerk from the printer.

Dated: September 26, 1950.

LEONARD, HANNA &
BROPHY,
Attorneys for Appellants,
By /s/ IVAN A. SCHWAB.
FRANK J. HENNESSY,
United States Attorney,
By /s/ MACKLIN FLEMING,
Assistant United States
Attorney,
Attorneys for Appellee Cyr.

[Endorsed]: Filed Sept. 26, 1950.

In the United States District Court for the Northern District of California, Southern Division

No. 28237-H

J. GORDON TURNBULL and SVERNDRUP and PARCEL, and U. S. FIDELITY AND GUARANTY COMPANY,

Complainants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation,

Respondent.

FINAL JUDGMENT

This cause having been submitted for decision, on the motion of respondent Albert J. Cyr, Deputy Commissioner, to dismiss the bill of complaint, and the Court having determined that the compensation order filed by the respondent, Albert J. Cyr, on the 8th day of July, 1948, is in accordance with law, and having on the 28th day of December, 1949, entered its order granting respondent's motion to dismiss; it is

Ordered, Adjudged, and Decreed that the complaint be dismissed and that respondent recover his costs.

Dated: September 12, 1950.

/s/ DAL M. LEMMON,
District Judge.

[Endorsed]: Filed Sept. 12, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that J. Gordon Turnbull and Sverndrup and Parcel and United States Fidelity and Guaranty Company, complainants in the above-entitled action, hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the final judgment dismissing the complaint herein, entered on the 12th day of September, 1950, and from the whole of said judgment and each and every part thereof.

Dated at San Francisco this 13th day of September, 1950.

LEONARD, HANNA & BROPHY,
Attorneys for Complainants.

/s/ EDMUND D. LEONARD,

/s/ IVAN A. SCHWAB.

[Endorsed]: Filed Sept. 13, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL UNDER RULE 75

Complainants hereby request that a supplemental record on appeal be prepared consisting of the following:

Final Judgment dated September 12, 1950.
Notice of Appeal dated September 13, 1950.

Dated at San Francisco this 13th day of September, 1950.

LEONARD, HANNA &
BROPHY,
Attorneys for Complainants.

/s/ EDMUND D. LEONARD,

/s/ IVAN A. SCHWAB.

[Endorsed]: Filed Sept. 13, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

Final Judgment.

Notice of Appeal.

Designation of Contents of Record on Appeal, Under Rule 75.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 19th day of September, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12493. United States Court of Appeals for the Ninth Circuit. J. Gordon Turnbull and Sverndrup and Parcel, and United States Fidelity and Guaranty Company, Appellants, vs. Albert J. Cyr, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 19, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12,493

IN THE

United States Court of Appeals

For the Ninth Circuit

J. GORDON TURNBULL, SVERNDRUP AND PARCEL and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, FEDERAL SECURITY AGENCY and LOIS G. M. ROSS, alleged widow of Kenneth R. Ross, and JOHN GARY ROSS (a minor child),

Appellees.

APPELLANTS' OPENING BRIEF.

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No. 12,493

IN THE

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Appellees.

APPELLANTS' OPENING BRIEF.

JURISDICTION.

Kenneth R. Ross was employed in the year 1943 by J. Gordon Turnbull and Sverndrup and Parcel, contractors on the Canol Project, a defense base project in the Yukon Territory in Canada, and United States Fidelity and Guaranty Company was the workmen's

compensation insurance carrier for said contractors. By compensation order dated April 26, 1946, the Deputy Commissioner for the United States Bureau of Employees' Compensation, Federal Security Agency, awarded benefits to Ross under the provisions of the Defense Bases Act (Act of August 16, 1941, 55 Stat. 622; Act of December 2, 1942, 56 Stat. 1035; 42 U.S. Code Secs. 1651-1654) which extended the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code Secs. 901-950) to employees of contractors on defense base projects. The award of compensation benefits to Ross was made because of a tuberculous condition which originated during his period of employment in 1943, and compensation payments were made by the insurance carrier pursuant to said compensation order from October 27, 1943, to March 19, 1948.

Ross died on March 30, 1948, as the result of his tuberculosis. On April 26, 1948, Lois G. M. Ross filed an application for death benefits under the Longshoremen's and Harbor Workers' Compensation Act as extended by the Defense Bases Act with the Deputy Commissioner for the Thirteenth Compensation District, Bureau of Employees' Compensation, Federal Security Agency, at his office in San Francisco, California, in which said Lois G. M. Ross set forth the claim that she was the widow of Kenneth R. Ross and that he also left surviving him a son, John Gary Ross, born September 2, 1947 (Tr. 24). A hearing was held on said claim before the Deputy Commissioner at Denver, Colorado, on June 15, 1949

(Tr. 29) and thereafter, on July 8, 1948, Appellee Albert J. Cyr, as Deputy Commissioner, filed in his office (which office is located in San Francisco, California) and served upon the parties a Compensation Order—Award of Death Benefits. (Tr. 26.) Within the time allowed by law and pursuant to the provisions of Section 3(b) of the Defense Bases Act (Act of August 16, 1941, Sec. 3(b), 55 Stat. 623, 42 U.S. Code 1653) and Section 21 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code, 921), appellants filed their complaint for injunction against the enforcement of the order in the United States District Court, Northern District of California, Southern Division, contending that the Compensation Order—Award of Death Benefits was not in accordance with law. (Tr. 2.)

On December 27, 1949, the Honorable Dal M. Lemmon, district judge, made and filed an order dismissing the complaint for injunction. (Tr. 19, 20.) Notice of appeal was filed February 17, 1950 (Tr. 20, 21), within the time allowed by law. (28 U.S. Code 2107.) Cost bond on appeal was also filed on February 17, 1950.

Jurisdiction of this Court upon appeal is invoked under 28 U.S. Code 1291.

STATEMENT OF THE CASE.

Kenneth R. Ross received compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Defense Bases

compensation insurance carrier for said contractors. By compensation order dated April 26, 1946, the Deputy Commissioner for the United States Bureau of Employees' Compensation, Federal Security Agency, awarded benefits to Ross under the provisions of the Defense Bases Act (Act of August 16, 1941, 55 Stat. 622; Act of December 2, 1942, 56 Stat. 1035; 42 U.S. Code Secs. 1651-1654) which extended the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code Secs. 901-950) to employees of contractors on defense base projects. The award of compensation benefits to Ross was made because of a tuberculous condition which originated during his period of employment in 1943, and compensation payments were made by the insurance carrier pursuant to said compensation order from October 27, 1943, to March 19, 1948.

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Act, from October 27, 1943, to March 19, 1948, because of a tuberculous condition contracted while he was employed on a defense base project in Yukon Territory, Canada. (Tr. 30.) Kenneth R. Ross died from tuberculosis on March 30, 1948. (Tr. 41.) On April 26, 1948, Lois G. M. Ross filed a claim with the Deputy Commissioner, Thirteenth Compensation District, Bureau of Employees' Compensation, Federal Security Agency, which was verified by Lois G. M. Ross before a notary public in Denver, Colorado, on April 19, 1948. (Tr. 24, 25.) In said claim, Lois G. M. Ross set forth that she was the widow of Kenneth R. Ross, the claim stating: "Widow was married to the deceased on 5th day of October, 1946 at Tiajuana, Mexico by Justice of the Peace." (Tr. 24.) The claim also set forth that the deceased was survived by a child, John Gary Ross, born September 2, 1947. (Tr. 24.) At a hearing held by the Deputy Commissioner in Denver, Colorado, on June 15, 1948 (Tr. 29), Lois G. M. Ross testified that the statement made under oath in the claim that a marriage ceremony was performed by a justice of the peace on October 5, 1946, was incorrect (Tr. 43) and that she and Kenneth R. Ross had never gone through any marriage ceremony. (Tr. 44.) She further testified that she first became acquainted with Mr. Ross when he was in the hospital in Canada receiving treatment for his tuberculosis (Tr. 45); that after Mr. Ross had moved to California, she came to see him there and commenced living with him in California in October, 1946 (Tr. 44); that she continued to live with Mr. Ross from that

time until his death in March, 1948 (Tr. 45); that she and Mr. Ross moved from California to Colorado in June, 1947, and lived together in Colorado Springs and later in Denver (Tr. 46); that she was the mother and Kenneth Ross the father of John Gary Ross, who was born in Denver, Colorado, on September 2, 1947. (Tr. 32.)

By Compensation Order—Award of Death Benefits dated July 8, 1948, the Deputy Commissioner made findings that Lois G. M. Ross "is the widow of the deceased herein by virtue of a common-law marriage contracted in the State of Colorado and is entitled to death benefit of $13.13 a week beginning with March 30, 1948", and that John Gary Ross "is the minor son of Kenneth Ross and Lois G. M. Ross and is entitled to a benefit of $3.75 a week beginning with March 30, 1948". (Tr. 27.)

SPECIFICATIONS OF ERROR.

I.

That the District Court erred in granting the motion to dismiss the complaint for an injunction against the enforcement of the Compensation Order—Award of Death Benefit entered by the appellee Cyr because said Compensation Order—Award of Death Benefit was not in accordance with law in that there was no substantial evidence in the proceedings before appellee Cyr to support the finding that the claimant Lois G. M. Ross is the widow of the deceased em-

ployee by virtue of a common-law marriage contracted in the State of Colorado.

II.

That the District Court also erred in granting the motion to dismiss because said Compensation Order—Award of Death Benefit was not in accordance with law in that the claimant Lois G. M. Ross is not included in the class of persons entitled to payment of a death benefit under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. Code 901 et seq.) and the Defense Bases Act (42 U. S. Code 1651-1654).

III.

That the District Court also erred in granting the motion to dismiss because said Compensation Order—Award of Death Benefit was not in accordance with law in that the claimant John Gary Ross is not included in the class of persons entitled to payment of a death benefit under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. Code 901 et seq.) and the Defense Bases Act (42 U. S. Code 1651-1654).

ARGUMENT.

I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING THAT THE CLAIMANT LOIS G. M. ROSS IS THE WIDOW OF THE DECEASED EMPLOYEE BY VIRTUE OF A COMMON-LAW MARRIAGE CONTRACTED IN COLORADO.

The record shows that Lois G. M. Ross and Kenneth R. Ross began living together in California in October, 1946, and continued to live together in that state until June, 1947. She did not acquire the status of a wife by this conduct, for it is well established that there is no such thing as a common-law marriage in California. (*Norman v. Norman,* 121 Cal. 620, 54 Pac. 143; 1 *Vernier, American Family Laws,* p. 106.) There can be no question but what the relationship of the parties during their stay in California was wholly illegal, which was quite apparently recognized by Lois G. M. Ross, since she falsely set forth in her verified claim an allegation that a marriage ceremony had been performed in Tiajuana, Mexico.

There are many cases that hold a relationship which is meretricious in its inception will be presumed so to continue even after a bar to a legal marriage has been removed. (*Sebree v. Sebree,* 293 Ill. 228, 127 N.E. 392; *Clark v. Barney,* 24 Okla. 455, 103 Pac. 598.) And it is well settled that mere cohabitation after the removal of the impediment is not sufficient to show a lawful marriage. (*McConnell v. McConnell,* 211 Mich. 483, 179 N.W. 33; *Lanham v. Lanham,* 136 Wis. 360, 117 N.W. 787; *Mayes v. Mayes,* 84 Ind. App. 90, 147 N.E. 630.) We submit that this principle is applicable here

and that evidence which, taken in its entirety, establishes nothing except that Lois G. M. Ross and Kenneth R. Ross continued to live together in Colorado after going there from California, representing themselves to the public as being husband and wife, is insufficient to support a finding that a valid common-law marriage was contracted in Colorado.

In the instant case, Lois G. M. Ross was a mature woman of 25 years of age when she commenced living with Kenneth R. Ross. She must be presumed to have known that under the law of California the relationship into which she was entering was an illicit one. That she in fact knew that the law of California required a ceremony for a valid marriage is further indicated by the fact that she asserted in her claim for compensation that there had been a marriage ceremony and by her testimony that when the subject was discussed with Kenneth R. Ross, "He said we would go to Mexico and get married." (Tr. 52.) The facts in this case require application of the rule set forth in the cases cited above and readily distinguish it from those cases that have reached a contrary result where the relationship was innocent in its inception and was entered into under a mistaken belief that a valid ceremony had been performed.

It is true that the record shows that declarations were made by Lois G. M. Ross and Kenneth R. Ross to the effect that they were husband and wife, which declarations found their way into hospital records, and birth and death certificates, and that representations

were made to their landlady and to trades people that they were Mr. and Mrs. Ross. But this evidence, when considered in conjunction with the evidence that the parties had lived together in the same manner previously in California, is not sufficient to establish that a common-law marriage was entered into in Colorado. As observed by one eminent authority:

> "Nor is the issue between informal marriage and illicit intercourse to be concluded by the conduct of the pair towards society. They may, for convenience or decency's sake, hold themselves out to third persons as man and wife, while yet sustaining at law, and intentionally, a purely meretricious relation."
>
> II *Schouler on Marriage and Divorce* (Sixth Edition), page 1439.

The modern tendency of the Courts is to look with disfavor upon claims depending for their validity upon the establishment of a common-law marriage, and to require very strong proof before holding that a valid common-law marriage has been contracted. There has been a recognition of the fact that the conditions which originally prompted Courts to recognize common-law marriages as valid have now disappeared, and that to continue to recognize such claims is to run counter to the purposes sought to be accomplished by more modern legislation respecting marriage. The modern tendency has been well stated by the Supreme Court of the State of Florida, as follows:

> "Because of the intrinsic importance to democratic government, and to society itself, of the

institution of marriage, much has been written by the courts of the land on the subject of those unions contracted without ceremony. The law universally condemns cohabitation without the bounds of wedlock and every effort has been made by the state and federal law makers to discourage and thwart it. By such precautions the very foundation of society, the home, has been safeguarded; the destructive results of promiscuity such as illegitimacy and tangled property rights have at least been curtailed.

"To lend dignity and solemnity to the marriage venture the law provides that it be inaugurated by a minister of the gospel, a judicial officer or a notary public. Despite the formalities required and the obvious importance of them some of the states recognize a marriage without ceremony. Many of them, however, have either abolished this form of contract or have refused to countenance it in the first instance, but it is approved or tolerated in Florida. Thus as Mr. Chief Justice Terrell points out in Le Blanc v. Yawn, supra [99 Fla. 328, 126 So. 791], an anomaly of the first degree is apparent for 'common-law * * * marriages were not recognized in the Colonies, and were abolished in the mother country [source of our common law] prior to the Revolution.'

"The thought that there may have been at one stage of the development of this country reasons for entering the marriage contract without the performance of any rite is suggested by an opinion of one of the Civil Courts of Appeals of Texas, McChesney v. Johnson, 79 S.W. 2d 658. It was commented in that decision that sparseness of

settlements, difficulty of travel, inaccessibility of ministers or officers given the right to perform the ceremony and unfamiliarity, through illiteracy, furnished some justification for dispensing with the formal marriage vows.

"The same considerations, of course, applied to Florida as it progressed from infancy to its present state of development. These conditions, however, do not now obtain. Distances to cities have shrunk because of modern methods of travel; a network of improved roads and arterial highways has made county seats, cities and towns accessible to nearly every dweller; churches have been established galore; and a school system furnishes the advantages of education even to the slothful. Why, then, should the common-law marriage be given the same recognition and dignity now that Florida has emerged from the status of a frontier? We can give no logical reason and although we will not attempt to abolish it by judicial fiat we will examine the evidence of such transactions with increasing caution for as the reasons for making informally a contract of such moment become more obscure so should the effort to establish it grow more difficult. This seems harmonious with the trend of late decisions and modern thought toward the abolition of consensual marriage."

McClish v. Rankin, 153 Fla. 324, 14 So. (2d) 714, 717.

The Texas Court, in reaching a conclusion similar to that of the Florida Court as set forth above, made the following pertinent observations:

"We do not say that all of the reasons for upholding common-law marriages have disappeared.

> We do say that the courts should review with care a common-law marriage claimed to have been contracted in the shadow of the county clerk's office and within the sound of church bells."
>
> *McChesney v. Johnson,* Tex. Civ. App. 79 S.W. (2d) 658.

Text writers also have recognized the modern tendency to require strong proof before recognizing the validity of a common-law marriage. As early as 1923, a writer in the Oregon Law Review observed:

> "Whether or not, by the spread of education and the facility for celebrating marriages without great expense and delay, we have yet reached the point where it is no longer necessary or desirable to recognize these informal marriages, is of course a debatable question. The modern trend, both in England and in this country, judging from the legislative enactments in relation thereto, would seem to be away from the common-law marriage, and the 'malodorous brood' of cases which arise therefrom.
>
> "There is a growing tendency in this country to improve the condition of the race by various statutory regulations concerning marriage. Certain states, for example Wisconsin, prohibit the marriage of the physically diseased. Other states also prohibit the marriage of the mentally unfit. Some of the states have passed so-called eugenic laws, under the provisions of which, marriage licenses are refused to those who do not present proper medical certificates showing that they are free from certain diseases. The practicability of

such laws may be questioned, but their purpose is undoubtedly most praiseworthy, and they have been held constitutional, even though applicable to men only, and also even when the physician's fee for the physical examination is arbitrarily limited to a certain amount. Obviously all such laws would be totally ineffective if licenses to marry were not necessary, and parties could freely marry simply by an agreement between themselves."

3 *Oregon Law Review* 28, 47.

Keezer, in the most recent edition of his work, says:

"Common-law marriage furnishes a means of defeating the effectiveness of reforms sought to be brought about through legislation. Laws requiring premarital physical examination are rendered ineffective. It cheapens marriage and gives instability to the home."

Keezer, Marriage & Divorce (3d Ed.) p. 59.

Colorado now has a statutory requirement for premarital physical examinations showing the parties to be free from venereal disease before a marriage license can be issued. (4 Colorado Statutes Annotated Ch. 107, Sec. 5(d).) This change in the statutory requirements respecting marriage was made in 1939. (Laws 1939, p. 455.) Diligent search has been made by counsel for appellants, but no Colorado decision has been found upholding the validity of a common-law marriage alleged to have been contracted since the 1939 change in the statutory requirements. For this Court to uphold the finding that a valid common-

law marriage was contracted in Colorado, upon the extremely weak record here presented, would amount to striking down by indirection the statute establishing the present policy of the state respecting the requirements for a valid marriage.

II.

EVEN IF IT BE CONCEDED THAT A COMMON-LAW MARRIAGE WAS CONTRACTED, THE CLAIMANT LOIS G. M. ROSS IS NOT INCLUDED IN THE CLASS OF PERSONS ENTITLED TO PAYMENT OF A DEATH BENEFIT.

Appellants contend that neither Lois G. M. Ross nor John Gary Ross were entitled to an award for death benefit because the statute provides that conditions as they exist at the time of injury, and not at the time of death, determine the persons entitled to a death benefit. Section 9 of the Longshoremen's and Harbor Workers' Act (33 U.S.C.A. 909) provides in its inception: "If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to and for the benefit of the persons following:". The section then has a number of sub-sections specifying the relatives entitled to a death benefit, the amount payable under various conditions and other provisions with respect to the payment of the death benefit. Sub-section (f) reads as follows: "All questions of dependency shall be determined as of the time of the injury."

We submit that the language of the statute, when given its common, ordinary meaning and when the

purposes sought to be accomplished are considered, requires that the question of whether Lois G. M. Ross and John Gary Ross are entitled to a death benefit must be decided upon the basis of conditions as they existed at the time of injury. The time of injury in this case was the period of employment from April 27, 1943, until October 27, 1943. At that time, Lois G. M. Ross was a stranger to the deceased employee, and John Gary Ross had not been conceived and was not in being. The earliest possible date at which Lois G. M. Ross could contend she acquired the status of a common-law wife is June, 1947, when she and the deceased employee removed from California to Colorado. That date was approximately four years after the date of injury, and the contention that a status acquired as of that late date entitles the claimant to an award for a death benefit is entirely inconsistent with the fundamental purpose of compensation laws to safeguard employees and those dependent upon their salaries for a living against loss of earning capacity as the result of injury.

The illogic of such a contention has been well stated in the Utah case of *Sarich v. Industrial Commission,* 64 Utah 17, 227 Pac. 1039. In that case, a woman married an injured employee ten days after the date of injury, while he was in a hospital with no hope of recovery from the effects of his injury. He died ten days after the marriage ceremony was performed. In refusing to allow an award to the widow, the Court made the following observations:

"Plaintiff married deceased at a time when he was mortally injured and without hope of recovery. Deceased was thus not only in a helpless physical condition at the time of the marriage, but was utterly without hope of ever being in any other condition. He was not earning a farthing at the time of or after the marriage that could have been devoted to the support of the plaintiff. Indeed, he was a helpless burden upon her. The whole theory and basis of our Industrial Act is that the claimant has been deprived of tangible support by reason of the injury and death of the deceased employee.

* * * * * * *

"Can plaintiff, by the mere act of marriage, therefore, convert a burden into a benefit? Can she, by her own act, create a dependency which did not and could not exist as a matter of fact? Can she, by merely creating the naked relation of husband and wife, claim the benefits of a most beneficent law which was intended to protect those who in truth and in fact were dependent upon the earnings of a deceased employe whose death resulted from an injury in the course of his employment? To permit plaintiff to recover in this case would result not only in a travesty of justice but would inevitably result in casting suspicion if not reproach upon a most just and beneficent statute."

The respondent Deputy Commissioner, when this case was before the District Court, contended that the provisions of Section 9(f) of the Longshoremen's and Harbor Workers' Compensation Act, that questions of dependency are to be determined as of the

time of injury, should not be applied in this case because, it was argued, the allowance of a death benefit to a wife and child does not involve a "question of dependency."

It was the contention of the Deputy Commissioner that the mere existence of the status of husband and wife, or father and child, at the time of the employee's death is sufficient to justify the award of a death benefit, and that the status in either event need not have existed at the time of injury. The contention that a wife or child is to receive a death benefit for some unexplained reason other than dependency on the earnings of the employee which are destroyed by his injury is based on what we believe to be an improper concept of the fundamental purpose of any compensation act.

The deputy commissioner cited a 1916 decision of an intermediate Appellate Court in the State of New York (*Crocket v. International Railway Company,* 176 App. Div. 45, 162 N.Y.S. 357), and *Maryland Drydock Co. v. Parker, Deputy Commissioner,* 37 F. Supp. 717, in support of his contention. In our opinion, the reasoning adopted by the New York Court in the first case cited is unsound and should not be followed, and we do not believe that the *Maryland Drydock Co.* case is inconsistent with our contention in the present case.

Many compensation laws provide that a surviving wife and minor children shall be conclusively presumed to be dependent upon a deceased employee.

Maryland Drydock Co. v. Parker, 37 F. Supp. 717, goes no further than to say that the Longshoremen's and Harbor Workers' Compensation Act should be interpreted as establishing a similar conclusive presumption of dependency in favor of the surviving wife and children. In that case, the deceased employee had been divorced and his wife had remarried. At the time of injury, the children were being supported by their stepfather. The district judge stated the question to be decided in the following language: "The sole question is whether the minor children are, by the provisions of the statute, proper beneficiaries of the award. The employer claims that they are not, because not *dependents in fact* upon their father, the deceased employee, at the time of his death. The Deputy Commissioner held that dependency in fact was not a prerequisite, *but was presumed.*" (Emphasis added.) The district judge then stated his decision as follows: "We find that the position taken by the Deputy Commissioner is sound, and that therefore the award must be affirmed."

As stated above, we believe that the decision of the Appellate Division, Supreme Court, of the State of New York, in *Crocket v. International Railway Company,* 176 App.Div. 45, 162 N.Y.S. 357, is unsound and should not be followed by this Court. Indeed, a study of other New York cases indicates that it is by no means established with any degree of certainty in that state that a wife's right to a death benefit does not involve a question of dependency. The point involved in the *Crocket* case has never been presented

to the highest Court in the State of New York. Furthermore, that decision was followed by another decision of the same Court that laid emphasis upon the presumption of dependency as the basis for an award to children of a deceased employee. *Crocket v. International Railway Company* was decided by the Third Department of the Appellate Division on December 28, 1916. A few months later, on March 7, 1917, the same department decided *Bell v. Terry & Tench Company,* 177 App. Div. 123, 163 N.Y.S. 733. Four of the five judges who participated in the decision of *Crocket v. International Railway Company* also participated in the decision of *Bell v. Terry & Tench Company.* The latter case held that illegitimate children were not entitled to a death benefit under the New York Compensation Act. In the course of its opinion, the Court stated:

> "Section 16 of the act provides that, 'if there be surviving child or children of the deceased under the age of eighteen years,' an additional amount shall be provided for such child or children until such child or children arrive at the age of 18 years, and this without reference to whether the children are dependent upon the father or not. In other words, *the statute presumes that the children of a parent are dependent upon him or her up to the age of 18 years,* and provides for them in the Compensation Law." (Emphasis added.)

On the very day that the Appellate Division decided *Crocket v. International Railway Company,* namely, December 28, 1916, the highest Court in New York

State decided *Shanahan v. Monarch Engineering Co.*, 219 N.Y. 469, 114 N.E. 795. In that case, a deceased employee left no widow or other relatives entitled to a death benefit under the Compensation Act. Brothers and sisters of the deceased employee who were not dependents sought to bring an action for wrongful death against the employer. The Court held that the Compensation Act furnished an exclusive remedy and that the action could not be maintained. The Court stated that the Compensation Act was passed for the "purpose of providing compensation for those who had a right to rely upon the support of the deceased employee." The opinion is replete with references to the right of *dependents* to recover a death benefit under the Compensation Act and nowhere in the opinion is there any indication that the Court considered the right to a death benefit as being anything else than a right founded upon a claim of dependency.

In view of the unsettled state of the New York law, and of the illogic of the result reached in *Crocket v. International Railway Company,* we submit that this Court should not follow that decision in interpreting Section 9(f) of the Longshoremen's and Harbor Workers' Compensation Act.

If dependency of a wife and minor children is presumed, then it logically follows that the question of who is a wife and who is a child presents a question of dependency, which must be determined as of the time of injury, in view of the provisions of Section 9(f) of the Act, which so provides.

The wording of other sections of the Act lends support to this interpretation. Section 2 (12) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code 902) defines "compensation" as follows: "'Compensation' means the money allowance payable to an employee *or to his dependents* as provided for in this Act, and includes funeral benefits provided therein." (Emphasis added.) Section 9(g), which immediately follows the subsection requiring interpretation in this matter, reads: "Aliens: Compensation under this chapter to aliens not residents (or about to become non-residents) of the United States or Canada shall be the same in amount as provided for residents, except that *dependents* in any foreign country shall be limited to surviving wife and child or children, * * *." If a surviving wife and child in a foreign country are regarded as dependents, are not resident wives and children also dependents?

Again, Section 14 (1) of the Act (33 U.S. Code 914 (1)) provides:

> "An injured employee or in case of death his dependents or personal representative, shall give receipt for payment of compensation to the employer paying the same, and such employer shall produce the same for inspection by the deputy commissioner whenever required."

If the widow and children are not dependents, Section 14 (1) would have the absurd result of requiring that the injured employee must give a receipt for compensation received and, likewise, his parents, brothers, sisters, and grandchildren must give re-

ceipts, but his widow and children are not required to give receipts.

The deputy commissioner advanced one further argument in the District Court that requires consideration. He argued that the word "injury" is defined in Section 2 of the Act to mean "accidental injury or death" and that, therefore, dependency is to be determined as of the time of death, since "injury" is defined in the disjunctive to mean either "accidental injury" or "death." It is obvious that Section (f) was inserted in the Act in recognition of the fact that where an injury did not immediately result in death, cases would be presented requiring a decision as to whether a death benefit should be allowed on the basis of conditions as they existed at the time of injury or on the basis of conditions as they existed at the time of death. The purpose of inserting Section 9(f) in the Act was to remove any uncertainty on this point. We submit that the word "injury" was not used as a term of art and should be given its ordinary meaning, for to adopt the interpretation urged by the deputy commissioner would be to make it uncertain which date should be taken and would destroy the very purpose for which the provision was inserted in the statute. To say that the statute requires questions of dependency to be decided as of the date of death would lead to harsh results in many cases. For example, let us assume that an injured employee had aged parents who were partially dependent upon him for support at the time

of injury. Let us also assume that he lived for two years before he died as a result of the injury and that as he had only his compensation payments on which to live, his mother obtained part-time employment which enabled the parents to become wholly self-supporting. It would be a strange perversion of the spirit and purpose of the Act to say the parents were not entitled to a death benefit because "injury" means "death" and they were self-supporting as of the time of death.

A study of the legislative history of the Longshoremen's and Harbor Workers' Compensation Act, and of the decisions of the United States Supreme Court respecting the constitutionality of that act and of state compensation acts, shows throughout a recognition of the purpose of such acts to provide for dependents who were supported by the employee at the time of his injury. The House Committee report on the Longshoremen's and Harbor Workers' Compensation Act contained this statement:

> "Workmen's Compensation has come to be universally recognized as a necessity in the interest of social justice between employer and employee. It is the modern substitute for the old common-law remedy afforded through actions at law for damages, and promptly affords relief to the injured employee by furnishing medical attendance and supplies immediately upon the occurrence of the injury or as soon thereafter as possible and compensation during the period of his illness or inability to pursue his usual employment, *and in case of death, financial assistance to his de-*

pendents, without the delay and expense which an action at law entails."

* * * * * * *

"The bill as amended, therefore, will enable Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution of the United States by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the Union." (Emphasis ours.)

House of Representatives Report No. 1767, 69th Congress, 2d. Session (1927), pages 19 to 20;

House Reports, 69th Cong. 2d. Sess. Volume 1.

It is hard to square this declared purpose of Congress that "in case of death financial assistance to his dependents" should be supplied with the contention advanced by the deputy commissioner that in this case a death benefit is to be granted entirely without reference to the statutory requirements respecting dependency.

The decisions of the United States Supreme Court passing on the constitutionality of state compensation statutes are also enlightening. In these decisions, the fundamental purpose of providing for dependents who looked to the employee for support through his wages at the time of his injury is recognized as a keystone of such laws.

"Provision is universally made in workmen's compensation acts for compensation not only to disabled employees, but to the dependents of those whose injuries are fatal. And the two kinds of payment or 'always regarded as component parts of a single system of rights and liabilities arising out of' the relation of employer and employee. Western Metal Supply Co. v. Pillsbury, supra. The objects of such acts 'is single,—to provide for the liability of the employer to make compensation for injuries received by an employee,' whether to the employee himself or to those who suffer pecuniary loss by reason of his death. Huyett v. Pennsylvania R. Co., 86 N.J.L. 683, 684, 92 Atl. 58.

"This court has, in several cases, sustained the constitutionality of workmen's compensation acts, from which the California act, in its constitutional aspects, is not distinguishable, establishing exclusive systems governing the liabilities of employers in hazardous occupations in respect to compensation for industrial accidents to employees, resulting in disability or death, and requiring compensation to be paid to a disabled employee or to his surviving dependents in accordance with prescribed scales, gauged upon the previous wage and the extent of the disability or dependency. New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N.C.C.A. 943; Mountain Timber Co. v. Washington, 243 U.S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N.C.C.A. 927; Ward & Gow v. Krinsky, 259 U.S. 503, 66 L.ed. 1033, 28 A.L.R. ....., 42 Sup. Ct. Rep. 529. And see Arizona Em-

ployers' Liability Cases (Arizona Copper Co. v. Hammer), 250 U.S. 400, 63 L. ed. 1058, 6 A.L.R. 1573, 39 Sup. Ct. Rep. 553. These acts were sustained in their entirety, without any separate reference to the status of the defendants (although in the White Case the right of a widow to compensation was directly involved), upon the broad ground that the state, by reason of its public interest in the safety and lives of employees engaged in such occupations, may provide, in the just and reasonable exercise of its police power, that the loss of earning power sustained by an employee through an industrial accident resulting in his disability or death, constituting a loss arising out of the business and an expense of its operation, shall, in effect, be charged against the industry after the manner of casualty insurance, and to that end require the employer to make such compensation as may reasonably be prescribed for the loss thus incurred in the common enterprise, irrespective of the question of negligence, to the injured employee or to his surviving dependents. New York C. R. Co. v. White (supra, pp. 203, 207); Mountain Timber Co. v. Washington (supra p. 243); Ward & Gow v. Krinsky (supra, p. 512). That is to say, as shown by these decisions, the compensation to dependents is merely a part of the general scheme of compensation provided by these acts for the loss resulting from the impairment or destruction of the earning power of an employee, caused by an industrial accident, which, in case of his death, is paid to those whom he had supported by his earnings and who have suffered direct loss through the destruction of his earnings power. And it is clear that the underlying reason

of these decisions applies alike to all dependents who, by his death, have been deprived of their support, whether they be residents or nonresidents of the state."

Madera Sugar Pine Co. v. Industrial Accident Commission of California, 262 U.S. 499, at 501-503, 67 L.ed. 1091, at 1093-1094.

"Briefly, *the statute* imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and *measures the death benefits according to the dependency of the surviving wife,* husband, or infant children." (Emphasis added.)

New York Central R. Co. v. White, 243 U.S. 188, at 202, 203, 205, 61 L. ed. 667, at 674.

In holding the Longshoremen's Act to be constitutional, the Supreme Court has specifically predicated its holding upon its former decisions in *New York Central R. Co. v. White,* and *Madera Sugar Pine Co. v. Ind. Acc. Com. of Calif.,* supra, and the entire line of cases in which it had previously sustained the constitutionality of the various state statutes.

"The propriety of providing by Federal statute for compensation of employees in such cases had been expressly recognized by this Court, and within its sphere the statute was designed to accomplish the same general purpose as the workmen's compensation laws of the States. In defining substantive rights, the Act provides for recovery in the absence of fault, classifies disabilities resulting from injuries, fixes the range of compensation in case of disability or death, and designates the classes of beneficiaries. In view of Federal power to alter and revise the maritime law, there appears to be no room for objection on constitutional grounds to the creation of these rights, unless it can be found in the due process clause of the 5th Amendment. But it cannot be said that either the classifications of the statute or the extent of the compensation provided are unreasonable. In view of the difficulties which inhere in the ascertainment of actual damages, the Congress was entitled to provide for the payment of amounts which would reasonably approximate the probable damages. See Chicago, B. & Q. R. Co. v. Cram, 228 U.S. 70, 84, 57 L. ed. 734, 740, 33 S. Ct. 437; compare Missouri P. R. Co. v. Tucker, 230 U.S. 346, 348; 57 L. ed. 1509, 1510, 33 S. Ct. 961. Liability without fault is not unknown to the maritime law, and, apart from this fact, considerations are applicable to the substantive provisions of this legislation, with respect to the relation of master and servant, similar to those which this Court has found sufficient to sustain workmen's compensation laws of the States against objections under the due process clause of the 14th Amendment. New York C. R. Co. v. White, 243 U. S. 188, 61

L. ed. 667, L.R.A. 1917D, 1, 37 S. Ct. 247, Ann. Cas. 1917D, 629, 13 N.C.C.A. 943; Mountain Timber Co. v. Washington, 243 U.S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642, 13 N.C. C.A. 927; Ward & Gow v. Krinsky, 259 U.S. 503, 66 L. ed. 1033, 28 A.L.R. 1207, 42 S. Ct. 529; Lower Vein Coal Co. v. Industrial Bd. 255 U.S. 144, 65 L. ed. 555, 41 S. Ct. 252; Madera Sugar Pine Co. v. Industrial Acci. Commission, 262 U.S. 499, 501, 502, 67 L. ed. 1091, 1093, 1094, 43 S. Ct. 604; R. E. Sheehan Co. v. Shuler, 265 U.S. 371, 68 L. ed 1061, 35 A.L.R. 1056, 44 S. Ct. 548; Dahlstrom Metallic Door Co. v. Industrial Bd. 284 U.S. 594, ante, 511, 52 S. Ct. 202. See Nogueira v. New York, N. H. & H. R. Co., supra (281 U. S. pp. 136, 137, 74 L. ed. 759, 760, 50 S. Ct. 303)."

Crowell v. Benson, 285 U.S. 22, at 40-42, 76 L. ed. 598, at 606-608.

It is, we respectfully submit, totally inconsistent with this uniform line of decisions by the Supreme Court to hold that a wife who acquired that status subsequent to the date of injury, who has suffered no loss of support by reason of the injury and who was a total stranger to the injured employee during his period of employment, is entitled to an award of a death benefit.

III.

THE CLAIMANT JOHN GARY ROSS IS NOT INCLUDED IN THE CLASS OF PERSONS ENTITLED TO PAYMENT OF A DEATH BENEFIT.

John Gary Ross was born September 2, 1947, which lacks but one month of being four years after the date of injury. Everything that has been said above with respect to the ineligibility of Lois G. M. Ross for a death benefit, by reason of the fact that she was not a dependent of the injured employee as of the time of injury, applies with equal force to John Gary Ross.

There appears to be but one reported case involving a claim for a death benefit under a compensation law of a child born after the date of injury and prior to the date of death; namely, *Magma Copper Company v. Naglich,* 60 Ariz. 43, 131 Pac. (2d) 357. In that case the employee was injured on February 12, 1940. He was married at the time but had no children. He died on January 21, 1942, leaving his wife and a child born in 1941 surviving him. The Court held that the child was not entitled to a death benefit, saying:

> "In view of the language of our statute and our decisions that the wife and children of a deceased employee do not take by virtue of their relationship, but of their dependency, we hold that under the statute the question of dependency is irrevocably fixed as of the date of the injury, and not the date of the death, and that since Norma Ree Ione Naglich not only was not born but was not conceived at the time of the injury, she could not have then been a dependent, present or prospective, upon her father for support, and is not entitled to compensation because of his death."

We submit that the reasoning of the Court in the Arizona case is sound and should be followed in this case.

CONCLUSION.

It is respectfully submitted that the order dismissing the complaint for injunction should be reversed and the case be remanded to the District Court with instructions to grant an injunction against the enforcement of the Compensation Order—Award of Death Benefit entered by the deputy commissioner.

Dated, San Francisco, California,
May 3, 1950.

Respectfully submitted,
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No. 12,493

IN THE

United States Court of Appeals

For the Ninth Circuit

J. GORDON TURNBULL, SVERNDRUP AND PARCEL and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, FEDERAL SECURITY AGENCY and LOIS G. M. ROSS, alleged widow of Kenneth R. Ross, and JOHN GARY ROSS (a minor child),

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLEE DEPUTY COMMISSIONER CYR.

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Dated, June 6, 1950.

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Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLEE DEPUTY COMMISSIONER CYR.

STATEMENT OF CASE.

This is an appeal from an order of the United States District Court for the Northern District of California, Southern Division, Honorable Dal M. Lemmon, District Judge, confirming a compensation

order of the deputy commissioner filed on July 8, 1948, in which he awarded compensation to Lois G. M. Ross and John Gary Ross, widow and minor son, respectively, of Kenneth R. Ross, hereinafter called "deceased" on account of the latter's death on March 13, 1948 from tuberculosis resulting from his employment. The said compensation order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424; 33 U.S.C.A. sec. 901 *et seq.* as made applicable to employments at certain defense base areas and under certain public works contracts by the Act of August 16, 1941, as amended, 55 Stat. 622; 42 U.S.C.A. secs. 1651 to 1654. The compensation liability of the employer was insured by the United States Fidelity & Guaranty Company, one of the appellants.

The deputy commissioner held a hearing on June 15, 1948 (Transcript 29) and upon the evidence adduced at said hearing found that Lois G. M. Ross and John Gary Ross were the widow and minor child, respectively, of the deceased and entitled to compensation as such.

FACTS.

In the compensation order the deputy commissioner found the facts to be as follows:

> "Compensation Order having been filed herein on April 26th, 1946 awarding to Kenneth R. Ross compensation benefits for temporary total disability at the weekly rate of $25.00 and the claim-

ant having died as the result of his injury on March 30th, 1948 and the claimant herein, Lois G. M. Ross, having filed a claim for death benefit as the Widow of Kenneth R. Ross and a hearing having been held on such claim and the case submitted for decision, the Deputy Commissioner makes the following:

FINDINGS OF FACT.

"* * * that Lois G. M. Ross, born May 21, 1921 is the widow of the deceased herein by virtue of a common-law marriage contracted in the State of Colorado and is entitled to death benefit of $13.13 a week beginning with March 30, 1948; that John Gary Ross, born September 2, 1947, is the minor son of Kenneth Ross and Lois G. M. Ross and is entitled to a benefit of $3.75 a week beginning with March 30, 1948 payable to Lois G. M. Ross as his natural guardian".

The employer and carrier thereupon instituted a proceeding for judicial review of the compensation order pursuant to the provisions of section 21 (b) of the Longshoremen's Act, 33 U.S.C.A. sec. 921 (b), alleging that said compensation order was not in accordance with law for the following reasons: (1) Because the evidence does not support the finding of the deputy commissioner that Lois G. M. Ross was the common-law widow of the deceased employee; (2) even if such status was shown it did not exist at the time of the injury; (3) that the child, John Gary Ross, was not born at the time of the injury and, hence, is not entitled to compensation; (4) that neither the widow nor the child was dependent upon the deceased employee at the time of the injury and,

hence, are not entitled to compensation as the *dependent* wife and child, respectively.

The Court below by order entered on December 28, 1949 sustained the award and it is from said order that this appeal is taken.

ARGUMENT.

I.

THE FINDING OF THE DEPUTY COMMISSIONER THAT LOIS G. M. ROSS IS THE WIDOW OF THE DECEASED IS SUPPORTED BY EVIDENCE.

Before referring to the evidence which, in our opinion, supports the finding complained of it may not be inappropriate to invite attention to the following well established principles of the compensation law.

The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family: *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner,* 284 U.S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris,* 61 App. D.C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc., et al. v. Cardillo, deputy commissioner,* 70 App. D.C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & O. R. Co.,* 71 F. (2d) 810 (C.C.A. 4, 1934), cert. den. October 8, 1934, 293 U.S. 581.

In the absence of substantial evidence to the contrary the presumption is "That the claim comes within the provisions of this Act"; section 20 (a) of the Longshoremen's Act.

The burden is on the plaintiff to show that there was no evidence before the deputy commissioner to support the compensation order complained of in the bill: *Grant v. Marshall, deputy commissioner,* 56 F. (2d) 654 (Wash. 1931); *United Employees Casualty Co. v. Summerous,* 151 S.W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, deputy commissioner,* 56 F. (2d) 654 (Wash. 1931); *Gulf Oil Corporation v. McManigal, deputy commissioner,* 49 S. Supp. 75 (W. Va. 1943).

Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable: *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Liberty Mutual Ins. Co. v. Gray, deputy commissioner,* 137 F. (2d) 926 (C.C.A. 9, 1943); *Michigan Transit Corporation v. Brown, deputy commissioner,* 56 F. (2d) 200 (Mich. 1929); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner, et al.,* 21 F. Supp. 535 (Me. 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner,* 23 F. Supp. 748 (N.Y. 1938); *Simmons v. Marshall, deputy commissioner,* 94 F. (2d) 850 (C.C.A. 9, 1938); *Lowe, deputy commissioner v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.C.A. 3, 1940); *Contractors, PNAB v. Pillsbury, deputy commissioner,* 150 F. (2d) 310 (C.C.A. 9, 1945).

The findings of fact of the deputy commissioner are presumed to be correct: *Anderson v. Hoage, dep-*

uty commissioner, 63 App. D.C. 169, 70 F. (2d) 773 (1934); *Luckenbach Steamship Co., Inc. v. Norton, deputy commissioner,* 96 F. (2d) 764 (C.C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson, deputy commissioner,* 141 F. (2d) 964 (C.C.A. 5, 1944).

It is solely within the province of the deputy commissioner or compensation administrator to determine the credibility of witnesses, and such official may believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability: *Wilson & Co., Inc. v. Locke, deputy commissioner,* 50 F. (2d) 81 (C.C.A. 2, 1931); *Naida v. Russell Mining Co.,* 159 Pa. Super. 155, 48 A. (2d) 16 (1946); *Griffin's Case,* 315 Mass. 71, 51 N.E. (2d) 768 (1944); *Pittsburgh Plate Glass Co. v. Morgeson,* 177 P. (2d) 115 (Okla. 1947); *Lockheed Aircraft v. Industrial Accident Commission,* 28 Cal. (2d) 756, 172 P. (2d) 1 (1946); *Square D. Co. v. O'Neal,* 66 N.E. (2d) 898 (Ind. App. 1946).

The rights, remedies and procedure under the Longshoremen's Act are governed exclusively by the statute, and the powers properly to be exercised by the Court are those only which are expressly conferred by the said Act: *Associated Indemnity Corp. v. Marshall, deputy commissioner,* 71 F. (2d) 235 (C.C.A. 9, 1934); *Shugard v. Hoage, deputy commissioner,* 67 App. D.C. 52, 89 F. (2d) 796 (1937); *Joseph W. Greathouse Co. v. Yenowine,* 193 S.W. (2d) 758 (Ky. 1946); *Luyk v. Hertel,* 242 Mich. 445, 219 N.W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton,* 9 S.W. (2d) 65 (Tex. 1928); *Nierman v.*

Industrial Comm., 329 Ill. 623, 161 N.E. 115 (1928); *Town of Albion v. Industrial Commission,* 202 Wis. 15, 231 N.W. 249 (1930). Compare also: *Bassett, deputy commissioner, v. Massman Construction Company,* 120 F. (2d) 230 (C.C.A. 8, 1941) cert. den. 62 S. Ct. 92.

In considering the evidence the deputy commissioner may give weight to "the common-sense of the situation": *Avignone Freres, Inc., et al. v. Cardillo, deputy commissioner, et al.,* 73 App. D.C. 149, 117 F. (2d) 385 (1940).

Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: *C. F. Lytle Co. v. Whipple, deputy commissioner,* 156 F. (2d) 155 (C.C.A. 9, 1946); *Contractors, PNAB v. Pillsbury, deputy commissioner,* 150 F. (2d) 310 (C.C.A. 9, 1945); *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner,* 309 U.S. 251 (1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, deputy commissioner,* 137 F. (2d) 926 (C.C.A. 9, 1943); *Lowe, deputy commissioner, et al. v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.C.A. 3, 1940); *Henderson, deputy commissioner v. Pate Stevedoring Co., Inc.,* 134 F. (2d) 440 (C.C.A. 5, 1943); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

With these principles in mind the record will be referred to show that there was evidence to support

the finding of the deputy commissioner that Lois G. M. Ross was the widow of the deceased employee.

Lois G. M. Ross testified at the hearing before the deputy commissioner on June 15, 1948, as follows: That she is the wife of Kenneth Robert Ross (T. 31); that she and Mr. Ross came to Denver, Colorado, in June, 1947 and lived at 1933 Downing Street; that during their stay in Colorado she and Kenneth *considered themselves man and wife and that there was such an agreement;* that their landlady, Mrs. Alice Reid, and several other friends knew of their relationship as man and wife, one of whom was Jesse Craft of 950 Acoma Street (T 32); that she and her husband were the parents of the child who was given the name of John Gary Ross, and was born in St. Lukes Hospital, Denver, Colorado, on September 2, 1947; that when the child was born she, the witness, was admitted to the hospital as Mrs. Ross (T. 33); (there was then received in evidence exhibit "A" (T. 34), which was a certificate from the hospital to the effect that Mrs. Lois Ross was admitted to the hospital as a maternity patient on September 2, 1947, and a baby boy was born to her on September 2, 1947, and that *their records show that Mr. Kenneth Ross was the husband of the patient and the legitimate father of the baby*); that she paid for the burial vault for Mr. Ross and the burial was through the Veterans Administration (T. 37); that at all times during her stay in Denver (and elsewhere) in Colorado while Mr. Ross was living and after his death she held herself out as being married to Kenneth Ross and that she has many letters showing that she was (T. 38).

There was then received in evidence exhibit "C" (T. 39), from the Department of the Army, Fitzsimons General Hospital, Denver, Colorado, dated April 1, 1948, addressed to Mrs. Lois Ross, expressing regret to her in the loss of *her "husband, the late Kenneth R. Ross"*. Exhibit "D" which was next received in evidence (T. 41), was the death certificate of Kenneth R. Ross and showed that he was married and that his *wife's name was Lois Ross.* The detailed information on the certificate apparently taken, as indicated by the answer to question 16, from the "hospital record", relating to the deceased's birthplace, his father's name and birthplace, his mother's maiden name and birthplace, etc. indicate that the *source of the information must have been the deceased himself,* showing that he considered himself *married to Lois Ross.* Exhibit "E" (T. 42), is the birth certificate of the child, John Gary Ross, and shows that he was born at St. Lukes Hospital in Denver, Colorado, on September 2, 1947, that his mother's usual residence was 1933 Downing Street, Denver, Colorado, that his father was Kenneth Robert Ross whose residence was 1933 Downing Street, and whose birthplace was La Junta, Colorado, that the mother's name was Lois Gwendolin Ross whose residence was 1933 Downing Street.

Mrs. Ross further testified that the information on the certificate from the hospital (exhibit "A", T. 34) to the effect that Kenneth R. Ross was the husband of Lois G. M. Ross, was given to the hospital by her husband (T. 43); that there was never any marriage ceremony; that the circumstances under which they

started to live together as husband and wife were that he was sick (tuberculosis) and did not have any one to look after him and so she started to do so in October, 1946 (T. 44); that she first met Mr. Ross in Canada when he was in a hospital there "with us" at Fort Sand, Saskatchewan (T. 45); apparently she was a nurse at the hospital as the records show that she is a registered nurse by profession; that she came to see him in California in 1946 and that they started to live together about that time and continued to do so until his death; that there is one child, a son nine and one-half months old (T. 45); that she was never married before nor was her husband; that they came to Colorado to live in June, 1947 and that she stayed in Colorado with him until his death in March, 1948; that he was admitted to Fitzsimons Hospital on March 4, 1948, and that he was in a sanitarium for a month in Colorado Springs where she was with him (T. 46).

Mrs. Alice Reid testified in part as follows: That her address is 1933 Downing Street, Denver, Colorado; that she operates an apartment house at that address and did so between June, 1947 and March, 1948; that during said period she became acquainted with Mrs. Ross in May (the witness stated it was in the year 1946 but apparently she meant 1947 as other parts of the record show clearly that they lived there from May or June, 1947 until his death in March, 1948); that the husband arrived a few days later; that during all the time that they lived there she understood them to be married to each other; that when the husband arrived the wife was on duty at the hospital and he introduced himself as her husband (T.

47, 48); that they were known in the neighborhood as husband and wife; that when Mrs. Ross applied for an apartment she introduced herself as Mrs. Ross (T. 49).

Jesse Craft testified in part as follows: That his address is 930 Acoma, Denver, Colorado, that he is acquainted with Mrs. Ross; that he operates a service station and Mr. Ross traded with him; that he knew both Mr. and Mrs. Ross who frequently appeared at the service station together; that he was introduced to Mrs. Ross by Mr. Ross as his wife (T. 50, 51).

Mrs. Ross testified that she and Mr. Ross discussed going through a marriage ceremony and Mr. Ross said they would go to Mexico; that he was too sick to go; that even though they anticipated entering into a ceremonial marriage she and Mr. Ross considered themselves married (T. 52).

Exhibit "F" was received in evidence (T. 54) and consisted of seven envelopes addressed to Mr. and Mrs. Kenneth Ross.

It would appear from the foregoing that the deputy commissioner's finding that Lois G. M. Ross is the widow of the deceased was supported by evidence and thus supported should under the authorities be considered as final and conclusive. *Cardillo, deputy commissioner v. Liberty Mutual Ins. Co.,* 330 U.S. 469 (1947); *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner,* 309 U.S. 251 (1940); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U.S. 162 (1933); *Crowell, deputy commissioner v. Ben-*

son, 285 U.S. 22 (1932); *Jules C. L'Hote, et al. v. Crowell, deputy commissioner,* 286 U.S. 528 (1932); 71 C.J. 1297, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Marshall, deputy commissioner v. Pletz,* 317 U.S. 383 (1943).

Common Law Marriage.

There are three elements necessary to constitute a valid marriage: (1) Intention of the parties, (2) legal capacity of the parties, (3) compliance with the laws of the state regarding solemnization of the marriage.

(1) *Intention:* Marriage is an agreement between a man and woman to become husband and wife. Like any other agreement there must be an intention, a meeting of the minds to enter into the contract. The intention can be determined from the acts and statements of parties. In the ordinary ceremonial marriage there is a public declaration by the parties that they there and then take each other as husband and wife. In non-ceremonial marriage the intention may be established by the declaration of the parties to friends and neighbors and in general by their actions in holding themselves out to the public as husband and wife. *United States v. Michaelson,* 58 F. Supp. 796 (Minn. 1945); *Klipfel's Estate v. Klipfel,* 92 P. 26, 41 Colo. 40. In the *Klipfel* case just cited the Court said:

> "Under the laws of Colorado marriage is a civil contract, and while the statutes provide for licenses, certificates, record and authority to per-

form the marriage ceremony, a marriage is not void because it is not contracted in accordance with these provisions or was contracted in violation of them.

"A marriage contract between parties capable of contracting, possessing clearly, *the one essential prerequisite of mutual consent,* followed by cohabitation as husband and wife, and such other attendant circumstances as are necessary to constitute the common-law marriage may be valid and binding although no solemnization has been attempted". (Emphasis supplied.)

There was nothing inconsistent in fixing the status of marriage *per verba de praesentia* and agreeing that the relationship then constituted shall be publicly solemnized at a future date. *Moffat Coal Co. v. Industrial Commission,* 118 P. (2d) 796, 108 Colo. 388.

(Appellants intimate (P. 13) that the present requirement in the Colorado law relating to a premarital physical examination should make a change in the decisions relating to the validity of common-law marriages in Colorado. It is well recognized that in the absence of any express declaration, the law presumes that an act relating to marriage did not intend to make any change in the common-law. *Buradus v. General Cement Products Co.,* 52 A. (2d) 205 and authorities there cited. *Bishop* on *Marriage, Divorce* and *Separation,* sec. 424, is authority for the statement that a common-law marriage is valid notwithstanding a statute unless the statute contains express words of nullity, 39 A.L.R. 538.)

In the instant case the parties indicated their intention to be husband and wife, to their neighbors and friends, to the hospital where their son was born, to the hospital where the deceased died, and to the people with whom they did business. Their entire course of conduct from June, 1947 to the day of the husband's death was such as to spell out an intention to be husband and wife. As the Court stated in a recent case of *Dondero v. Queensboro News Agency,* 60 N.Y.S. (2d) 140 (1946):

> "A non-ceremonial marriage is not required to be proven in any particular manner; like any other fact it may be shown by direct or circumstantial evidence * * *.
>
> "Hearsay and traditional evidence, as well as an admission of a party, is competent to prove a marriage when such evidence is the best the nature of the case will afford * * *".

It was for the deputy commissioner as the trier of the fact to determine whether the parties intended to enter into a marital relationship; if there is evidence to support his finding as to said marital relationship said finding is conclusive. *Green v. Crowell, deputy commissioner,* 69 F. (2d) 762 (C.A. 5, 1934) cert. den. 293 U.S. 554.

(2) There is no evidence in the record that there was any impediment which would have prevented the parties from being husband and wife.

(3) *Compliance with the laws of the State regarding solemnization of the marriage:* It is a well established rule of conflict of laws and it was pointed out

as a definitely established doctrine in *Keyway Stevedoring Co. v. Clark,* 43 F. (2d) 983 (Md. 1930) which was a proceeding brought under the Longshoremen's and Harbor Workers' Compensation Act that the validity of a marriage is determined by the law of the place where the marriage was contracted. Inasmuch as the parties were unquestionably domiciled in Colorado at the time of Mr. Ross' death, it is proper to consider the evidence as to the marriage in accordance with the laws of Colorado. *Travers v. Reinhardt,* 205 U.S. 423, 440. In the *Travers* case just cited the parties entered into a relationship in Virginia which, however, did not constitute a valid marriage because the laws of Virginia prevented it; they then moved to Maryland which likewise did not recognize non-ceremonial marriages, and from there they moved to New Jersey where they lived until the husband's death. In these circumstances, the Supreme Court said:

> "This brings us to consider what were the relations of these parties after selling the Maryland farm and after taking up their residence in New Jersey in 1883. That their cohabitation, as husband and wife, after 1865 and while they lived in Maryland, continued without change *after they became domiciled* in New Jersey and up to the death of James Travers; and that they held themselves out in New Jersey as lawfully husband and wife, and recognized themselves and were recognized in the community as sustaining that relation, is manifest from all the evidence and circumstances. It is impossible to explain their conduct towards each other while living in New Jersey upon any other theory than that they re-

garded each other as legally holding the matrimonial relation of husband and wife. It is true that no witness proves express words signifying an actual agreement or contract between the parties to live together as husband and wife. No witness heard them say, in words, in the presence of each other, 'We have agreed to take each other as husband and wife, and live together as such'. But their conduct towards each other, from the time they left Alexandria in 1865 up to the death of James Travers in 1883, admits of no other interpretation than that they had agreed, from the outset, to be husband and wife. And that agreement, so far as this record shows, was faithfully kept up to the death of James Travers * * *.

"Did the law of New Jersey recognize them as husband and wife *after they took up their residence* in that State and lived together, in good faith, as husband and wife and were there recognized as such? Upon the authorities cited this question must be answered in the affirmative.

"We are of the opinion that even if the alleged marriage would have been regarded as invalid in Virginia for want of license, had the parties remained there, and invalid in Maryland for want of a religious ceremony, had they remained in that State, it was to be deemed a valid marriage in New Jersey after James Travers and the woman Sophia, as husband and wife, took up *their permanent residence* there and lived together in that relation, continuously, in good faith, and openly, up to the death of Travers—being regarded by themselves and in the community as husband and wife. Their conduct towards each other in the eye of the public, while in New Jersey, taken in connection with their

previous association, was equivalent, in law, to a declaration by each that they did and during their joint lives were to occupy the relation of husband and wife. Such a declaration was as effective to establish the status of marriage in New Jersey as if it had been made in words of the present tense after they became domiciled in that State".

Marital Status of Claimant.

Some portion of appellants' brief has been devoted to an effort to show that a common-law marriage could not arise because the parties knew that in California a common-law marriage could not take place (and apparently that the relationship could not ripen into a valid marriage in Colorado where they later repaired). This presumably was an effort to distinguish the instant case from the celebrated case of *Travers v. Reinhardt,* 205 U.S. 423. Whatever present effectiveness there may be to the rule that a "meretricious" relationship can not ripen into a marriage, it is respectfully submitted that the relationship between claimant and the deceased was not meretricious in Colorado (if indeed it may be so considered in California). The evidence shows that from the beginning of the relationship in Colorado it was intended to be a marriage relationship. Moreover, even if the relationship were meretricious in the beginning it became a valid marriage upon removal of the impediment (if the laws of California can be considered an impediment in the sense in which it is used in the rule that upon removal of an impediment an otherwise illegal relationship ripens into a valid marrige) when the parties removed to Colorado. That was exactly

the situation in *Travers v. Reinhardt,* supra, and the fact that in that case one of the parties was not aware that the relationship in Virginia and in Maryland, respectively, did not constitute a marital relationship would not distinguish that case from the instant case. The import of the *Travers* case is that a marriage which is valid where it takes place is valid everywhere, and that when the parties came to New Jersey to live in a matrimonial relationship which was recognized under the laws of New Jersey, it was immaterial that prior thereto they had lived together in Maryland and Virginia, in neither of which jurisdictions was the relationship recognized as a marriage.

Moreover, the rule that upon removal of an impediment a common-law marriage may arise has sometimes been applied "though one or both parties know of the impediment". *Thomas v. Murphy,* 107 F. (2d) 268 (App. D.C. 1939); *Cartwright v. McGown,* 121 Ill. 388, 12 N.E. 737; *Lanham v. Lanham,* 136 Wis. 360, 117 N.W. 787.

Appellants also urge in substance that common-law marriages should not be encouraged. That may be so, but as stated in *Hoage, deputy commissioner v. Murch Bros. Construction Co.,* 50 F. (2d) 983, 986 (App. D.C. 1931) "if the doctrine of common-law marriage is contrary to public policy and public morals, it is for Congress (in the District of Columbia and correspondingly for the legislatures in the various states) and not the Courts to do what is needful by appropriate legislation to declare such unions null and void". This was a compensation case under the same Act.

II.

PLAINTIFFS' OTHER OBJECTIONS TO THE COMPENSATION ORDER ARE NOT WELL FOUNDED.

Plaintiffs' other objections to the compensation order were: (a) that even if Mrs. Ross established the status of widow she was not the wife of the deceased at the time of injury (b) likewise that John Gary Ross was not a child of the deceased at the time of injury, and (c) in any event that the widow and child were not "dependent" upon the deceased at the time of injury and, hence, are not entitled to compensation.

Section 2 (16) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. sec. 902 (16), defines the term "widow" as:

> "The term 'widow' includes only the decedent's wife living with or dependent for support upon him *at the time of his death;* or living apart for justifiable cause or by reason of his desertion *at such time".*

The Act has never been construed as to bar a surviving wife from benefits because she married the employee after the injury; a similar provision in the New York Workmen's Compensation Law *from which the Longshoremen's was taken almost verbatim* was given a similar construction prior to the enactment of the Longshoremen's Act. *Crockett v. International Railway Co.,* 162 N.Y.S. 357, 176 App. Div. 45 (1916) cited with approval in *Mutimer v. General Electric Company,* 201 N.Y.S. 588, 207 App. Div. 1 (1923), which held in addition that a provision in the New York Law similar to Section 9 (f) of the Longshore-

men's Act was not applicable in the case of a widow since she is not required to prove dependency where she was living with her husband. Accord: *Van Wyk v. Realty Traders,* 213 N.Y.S. 28, 215 App. Div. 254 (1926). The Court in that case stated that compensation death benefits were intended as a substitute for the right to sue which the survivors might have for the death of the husband and father, and that in such action the surviving wife would have been entitled to recover regardless of the fact that she married the deceased after the injury. The Court further stated that it should not be assumed that it was intended to restrict or narrow the widow's rights or to place her in a less advantageous position than she would have occupied before. Under familiar rules of construction the adoption of a statute carries with it the construction placed upon the adopted statute in the jurisdiction of its origin. *Capitol Traction Co. v. Hof,* 174 U.S. 1; *Metropolitan Railroad Co. v. Moore,* 121 U.S. 558; *Bethlehem Shipbuilding Corp., v. Monahan, deputy commissioner,* 54 F. (2d) 349 (C.A. 1, 1931), cf. *Case v. Pillsbury, deputy commissioner,* 148 F. (2d) 392 (C.A. 9, 1945). We have cited three decisions under the New York Law prior to the enactment of the Longshoremen's Act, all of which clearly support the position that a surviving wife who marries an employee after an injury is his widow within the meaning of the compensation law and that actual dependency of the widow is irrelevant in the consideration of her entitlement to compensation benefits.

Appellants assert however that the *Crockett* case, supra, the New York case which was decided prior

to the enactment of the Longshoremen's Act, should not be followed because it is not a decision of the highest Court of that state. Whether the decision of an intermediate Court of the State of New York construing a similar section of the New York Workmen's Compensation Law from which the Longshoremen's Act was adopted is merely persuasive or should be followed by a Federal Court in the absence of more evident indication of the meaning of a state law, we are not prepared to say. There is, however, authority for the latter view, *Six Companies v. Joint Highway District No. 13,* 311 U.S. 180, 132 A.L.R. 967; *Fidelity Union Trust Co. v. Field,* 311 U.S. 169; *Kane v. Sesac,* 54 F. Supp. 853.

The following cases also hold that a widow who married the employee after the injury is entitled to compensation: *Reagh v. Texas Indemnity Insurance Co.,* 67 S.W. (2d) 233, 123 Tex. 57 (1934); *McKay v. Dept. of Labor,* 39 P. (2d) 997, 180 Wash. 191, 98 A.L.R. 990 (1935); *State Compensation Insurance Fund v. Hartman,* 64 P. (2d) 122, 99 Colo. 324 (1937); *Rosell v. State Industrial Accident Commission,* 95 P. (2d) 726, 164 Or. 173 (1939).

The construction which we here advocate is consistent with the use of the words "dependent husband" in Section 9 of the Act, relating to the receipt of compensation whereas in the same section the "surviving wife" is directed to be paid. The section directs payment to the "surviving wife or dependent husband". Likewise in Section 2 (17) of the Act, 33 U.S.C. Sec. 902 (17) a widower is defined as the decedent's husband who at the time of her death lived

with her *"and was dependent for support upon her"*. There is no such requirement in the case of a wife (see Sec. 2 (16)) except where not living with the husband.

The same reasoning with respect to the wife who married the deceased after the injury would apply to a child of a deceased born after the injury. As the Court stated in *Crockett v. International Railway Co.*, supra,

> "* * * but suppose a man married before an injury, lives a year or longer, after such injury, and then dies in consequence thereof, and in the meantime a child or children is born to him before his death, such child or children would have to be excluded from the benefits of this statute, if the widow in this case is to be excluded therefrom. It is unthinkable that the legislature intended such a result".

There is nothing in the definition of "child" in the Act, Sec. 2 (14), 33 U.S.C.A. Sec. 902 (14) which would limit the benefits payable to a "surviving child or children of the deceased", Sec. 9 (b), 33 U.S.C.A. Sec. 909 (b), to children who were born prior to the injury. Appellants urge that the definition of "widow" and "child" should be qualified by the provision in Sec. 9 (f), 33 U.S.C.A. Sec. 909 (f), to the effect that "all questions of dependency shall be determined as of the time of injury". It may be stated that death benefits to the wife and children do not rest upon dependency. *Maryland Dry Dock Co. v. Parker, deputy commissioner,* 37 F. Supp. 717 (Md. 1941); *Crockett v. International Railway Co.,* 162 N.Y.S. 357, 176 App. Div. 45 (1916). They are en-

titled to compensation whether or not they are dependent, hence said provision does not relate to them. It is not the "dependent wife" but the "surviving wife" and it is not the "dependent child" but the "surviving child" who is entitled to the award under Section 9 (b), 33 U.S.C.A. sec. 909 (b). If, therefore, the phraseology be given its ordinary and natural meaning a "surviving wife" or a "surviving child" means a wife or child respectively who survives the husband and father, irrespective of the time the wife married him or of whether the child was born after the injury. That the widow and children may be considered as included in the generic term "dependents" elsewhere in the Act in the sense that all persons who receive compensation death benefits are referred to as "dependents" does not mean that they must establish dependency. The same term in the same Act may have varying meanings depending upon the context. *Lawson, deputy commissioner v. Suwanee Fruit & S.S. Co.,* 336 U.S. 198 (1949). In section 5 of the Longshoremen's Act for example the surviving wife is enumerated separately from "dependents".

If the surviving wife must also be *a dependent wife* to be entitled to compensation then the provision in the second category of the definition of widow in Section 2 (16) of the Act, 33 U.S.C.A. Sec. 902 (16), is superfluous; in substance it requires a wife who is *not living with the husband at the time of his death* to show that she was "dependent for support upon him at the time of his death". As stated, if dependency is always an element of proof in the case of a surviving wife, the quoted provision was unnecessary.

It is to be noted also that in all the categories in said Section 2 (16), 33 U.S.C.A. Sec. 902 (16) relating to the definition of widow, it is emphasized therein that the qualifying conditions refer to the *time of death* of the deceased employee, not to the time of injury.

Moreover, assuming *arguendo* that the provision in Section 9 (f) to the effect that all questions of dependency shall be determined as of the time of injury limits the right to compensation to those in existence and having the proper status at the time of the injury, the word "injury" is defined in subdivision 2 of Section 2 of the Longshoremen's Act (33 U.S.C.A. Sec. 902 (2)) also to mean "death"; therefore where death results from accidental injury and it is necessary to determine whether dependency existed, such dependency is to be determined as of the time of death. This is consistent with the rule of statutory construction that all provisions of a statute should be construed together. It has been stated particularly that Section 9 of the Longshoremen's Act should be construed with Section 2 (16) in the determination of a widow's right to compensation. *Williams v. Lawson, deputy commissioner,* 35 F. (2d) 346; *Moore Dry Dock Company v. Pillsbury, deputy commissioner,* 169 F. (2d) 988 (C.A. 9, 1948). Therefore in determining whether the widow is entitled to compensation under the provisions of Section 9, consideration should be given to Section 2 (16), which defines the term "widow" and emphasizes that the determination should be made as of the date of death.

CONCLUSION.

In view of the above it may be stated that the determination of the deputy commissioner to the effect that Lois Ross and John G. Ross are the widow and child respectively of the deceased "has substantial roots in the evidence", the award "is not forbidden by the law" and is therefore conclusive. (Quotation is from *Cardillo, deputy commissioner v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 478 (1947)).

It is respectfully submitted that the compensation order complained of was in accordance with law and that the order of the Court below sustaining it, was proper and should be affirmed.

Dated, San Francisco, California,
June 6, 1950.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

MACKLIN FLEMING,
Assistant United States Attorney,
Attorneys for Appellee Cyr.

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Federal Security Agency,
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Of Counsel.

No. 12494

United States
Court of Appeals
for the Ninth Circuit.

F. E. LEITNER, also known as S. F. Leitner, also known as Frederick Leitner, RAPHAEL PORTA and WILLIAM E. BARDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Plaintiff and Appellee.

United States District Court for the Northern District of California, Southern Division

No. 28814-E

UNITED STATES OF AMERICA,

Plaintiff,

vs.

F. F. LEITNER, aka S. F. LEITNER, aka FREDERICK LEITNER, RAPHAEL PORTA and WILLIAM E. BARDEN,

Defendants.

FIRST AMENDED COMPLAINT FOR INJUNCTION AND RESTITUTION

Count I.

1. In the judgment of the Housing Expediter, the defendants have engaged in acts and practices which constitute violations of Section 206(a) of the Housing and Rent Act of 1947, as amended (Public Law 31, 81st Congress, 1st Session).

2. Jurisdiction of this action is conferred upon this Court by Sections 206(b) and 206(c) of said Housing and Rent Act of 1947, as amended.

3. At all times mentioned herein defendants were the landlords of and rented certain controlled housing accommodations located within the San Francisco Bay Defense-Rental Area, and more particularly described as 1760-A Filbert Street, San Francisco, California, lower or front flat.

4. Since July 1, 1947, there has been in full force

and effect pursuant to said Housing and Rent Act of 1947, as amended, the Rent Regulations issued pursuant to said Act, establishing a maximum rental for the use and occupancy of housing and rental accommodations within the defense-rental area in which the premises referred to in Paragraph 3 of Count I above are located.

5. Since July 1, 1947, defendants demanded, accepted or received from tenants occupying the premises described in Paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations, as appears more fully in Item 1 of the Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

6. Since July 1, 1947, defendants demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the name of which tenants or the premises involved being presently unknown to the Plaintiff.

Wherefore, the Plaintiff demands and prays:

1. That an injunction be issued enjoining the defendants, their attorneys, agents, servants, and employees and all other persons in active concert or participation with the defendants from directly or indirectly demanding, accepting or receiving rents in excess of the maximum rents established by any Regulation or Order heretofore or hereafter adopted, pursuant to the Housing and Rent Act of

1947, as heretofore or hereafter amended, or extended, or superseded, or from engaging in any acts and practices which constitute or will constitute a violation of any of the provisions of the Housing and Rent Act of 1947, as amended, or extended, or superseded, or of the Rent Regulations issued pursuant thereto.

2. That the defendants be ordered and directed to pay to the Treasurer of the United States, for and on behalf of all persons entitled thereto, a refund of all amounts in excess of the lawful maximum rents which have been or may be demanded, accepted or received by the defendants from any tenants for or in connection with the use or occupancy of the housing accommodations hereinbefore described; or, in the alternative, that the defendants be ordered and directed to pay the amounts in excess of the lawful maximum rents as hereinabove prayed to the Treasurer of the United States.

3. That such other, different or further relief to which Plaintiff may be entitled be granted, or other relief be accorded, which the Court may find necessary to effectuate the purposes of the said Act as now existing, or hereafter amended or superseded, and of any orders or regulations issued thereunder.

4. That Plaintiff recover the costs of this action.

Dated this 5th day of May 1949.

/s/ SIDNEY FEINBERG,
Attorney, Office of the
Housing Expediter.

EXHIBIT "A"

R-VIII-603
(3-49)

Schedule

Item	Tenant	Unit	Date Rented	Rent Collected	Maximum Legal Rent	No. of Overcharges	Amt. of Each Overcharge	Overcharge to Each Tenant
1	Mr. & Mrs. Herald Hawkins	1760-A Filbert Street San Francisco, Calif. Lower or front flat	Jan. 1, 1948 to Apr. 1, 1949	$65.00 per mo.	$25.00 per mo.	15	$40.00	$600.00

[Endorsed]: Filed May 6, 1949.

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT FOR INJUNCTION AND RESTITUTION

Come now defendants above named and answering the complaint of plaintiff above named admit, deny and aver as follows:

I.

Answering the allegations contained in paragraphs I, II, III, IV, V and VI of said complaint these defendants deny each, every, all and singular the allegations therein contained.

II.

As and for a separate, second and further defense to the matters and things set forth in plaintiff's complaint, defendants aver that Henry Cross is and was at all of the times herein and in said complaint mentioned the duly appointed, qualified and acting Rent Director for the San Francisco Bay Defense Rent Area, duly appointed as such by Tighe E. Woods, United States Housing Expediter under and by virtue of the authority vested in him by the Housing and Rent Acts of 1947 and 1948 and amendments thereto, being Title 54, Appendix 94 United States Code; that at all of the times herein mentioned, defendants have been and now are the owners of that real property with the improvements thereon known and designated as 1760-1770 Filbert Street in the City and County of San Francisco,

State of California; that apartment 1760-A Filbert Street is and was at all of the times herein mentioned an apartment located in said real property and improvements thereon.

III.

Defendants further allege that said apartment 1760-A formerly designated and described as apartment 1760 Filbert Street, was occupied from March, 1942 to and through July 12th, 1947, by an employee of the then owner of said apartment house, and the name of said employee was one E. G. Leres; that said apartment 1760-A Filbert Street, San Francisco, California, was occupied by said E. G. Leres as a servant, caretaker and manager of the then owner of said apartment house and of the defendants herein when they acquired title to said property, as all of his compensation for services rendered as such servant, caretaker and manager and the said E. G. Leres was employed for the purpose of rendering services in connection with the said premises designated as 1760-1770 Filbert Street, San Francisco, California, and that said apartment 1760-A was at all of the times herein mentioned and now is a part of said apartment house; that thereafter and on or about the 13th day of July, 1947, S. F. Leitner, one of the defendants herein occupied said apartment 1760-A Filbert Street, San Francisco, California, and continued to occupy said apartment to and including the 26th day of December, 1947; that thereafter and on or about the 27th day of

December, 1947, defendants herein rented said apartment 1760-A Filbert Street, San Francisco, California, to M. B. Hawkins and he has occupied said apartment as a tenant of defendants ever since said date and now does occupy said apartment as a tenant of defendants herein.

IV.

That the said defendants herein did not at any time since they became owners of the said real property and the owner preceding the defendants herein, one Leo Marchetta who owned said property at all of the times herein prior to the time that defendants acquired the same did not at any of the times herein mentioned, that is to say, from the 1st day of January, 1942, to the time that he sold the said real property to the defendants herein register the said property with the Office of Price Administration or with the Henry A. Cross, as San Francisco Bay Area Defense Rent Area Director as a housing accommodations or as a rental unit, subject to the Emergency Price Control Act or the Housing and Rent Acts of 1947 and 1948 or at all; that by reason of the foregoing, said apartment 1760-A Filbert Street, San Francisco, California, was not subject to the Rent Control Provisions of the Rent Acts of 1947 and 1948 and was expressly exempted from the application of said Acts by Section 1, Subdivision b(ii) of Regulation 825 of the United States Housin Expediter; that Henry A. Cross, as San Francisco Bay Area Defense Rent Area Director, in a

letter to Mr. William Barden, one of the defendants herein expressly admitted that said apartment 1760-A Filbert Street, San Francisco, California, was a dwelling unit which was in existence on February 1, 1945, and which at no time during the period February 1, 1945, to January 31, 1947, both dates inclusive, was rented (other than to members of the immediate family of the occupant) as housing accommodations and therefore decontrolled under the provisions of the Rent Act of 1947 and not subject to the maximum rental provisions of said Rent Act of 1947 and not subject to the control of Henry A. Cross as San Francisco Bay Area Defense Rent Area Director.

Wherefore, defendants pray that the said plaintiff take nothing by reason of its complaint herein and that defendants be hence dismissed with costs of suit.

/s/ JOHN F. O'SULLIVAN,
Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 1, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS PLAINTIFF'S INTERROGATORIES

To: John F. O'Sullivan, Esquire, Attorney at Law, 1500 Central Tower, San Francisco, California.

For the purpose of this action only, pursuant to

the provisions of Rule 36, as amended, of the Federal Rules of Civil Procedure, plaintiff requests the defendants to admit the genuineness of the documents described and exhibited herewith, if any, to admit the truth of the following relevant matters of fact.

1. That at all times material to this action defendants were the landlords of certain controlled housing accommodations, more particularly described and set forth in Schedule A attached to Plaintiff's First Amended Complaint, which schedule is by reference incorporated herein.

2. That the items in said schedule truthfully and correctly designate the name of the tenant who occupied the designated housing accommodations.

3. That the items in said schedule truthfully and correctly designate the periods said tenant occupied said accommodations.

4. That the items in said Schedule A truthfully and correctly designate the rentals collected from said tenant.

5. That said schedule truthfully and correctly designates the registered legal rents in force for the indicated housing accommodations for the periods of time referred to in request No. 3.

Interrogatories

Pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure, as amended, Plain-

tiff addresses to the defendants F. F. Leitner, Raphael Porta and William E. Barden the following interrogatories, to be answered separately, fully, and under oath, within fifteen (15) days, if the defendants can not admit Plaintiff's Request for Admissions in their entirety:

1. State the name of the person occupying the premises designated in Exhibit A attached to Plaintiff's within and foregoing Complaint.

2. What was the period of said tenant's occupancy?

3. Was the occupancy on a weekly or monthly basis?

4. How much rent was collected for said tenant's occupancy of the designated housing accommodations per week or month as designated in Interrogatory No. 3?

5. If the defendants do not admit the basic registered maximum rent as set out in the aforementioned Exhibit A to Plaintiff's Complaint, state what the defendants claim the legal maximum rent to be and upon what facts said claim is based.

Dated this 29th day of July, 1949.

/s/ SIDNEY FEINBERG,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed August 3, 1949.

[Title of District Court and Cause.]

DEFENDANT'S ADMISSION OF CERTAIN FACTS REQUESTED BY PLAINTIFF — DENIAL OF THE TRUTH OF CERTAIN FACTS REQUESTED BY PLAINTIFF — AND ANSWER TO PLAINTIFF'S INTERROGATORIES

In compliance with the demand of plaintiff herein, defendants admit or deny requested admissions as follows and answer plaintiff's interrogatories as follows:

I.

Referring to the demand for admission contained in heading No. 1 of plaintiff's request for admission, defendants aver that they became the owners of the real property which is the subject of this action on or about the 21st day of April, 1947, ever since have been and now are the owners in fee simple of said real property; defendants deny that the premises, the subject of this action, were at any time mentioned in plaintiff's complaint controlled housing accommodations and aver that said premises were not at any time subject to control by the Housing Expediter, under the laws of the United States of America, or at all.

II.

Answering plaintiff's second request for admission these defendants aver that apartment 1760-A Fil-

bert Street, San Francisco, California, was rented by defendants to Mr. and Mrs. Harold Hawkins on or about the 27th day of December, 1947 and that said Mr. and Mrs. Harold Hawkins ever since said date have occupied by said apartment and do now occupy said apartment as said tenants of said defendants; save as admitted herein in this paragraph said defendants deny that the items in said schedule truthfully and correctly designate the name of the tenant who occupied the designated housing accommodations.

III.

These defendants admit the matters set forth in paragraph No. 3 of plaintiff's request for admissions.

IV.

These defendants admit that $65.00 per month up to and including February, 1949; otherwise these defendants deny that said schedule A truthfully and correctly designate the rent collected from said tenant.

V.

Answering the request for admission contained in paragraph No. 5 of said plaintiff's request for admission these defendants deny that said schedule truthfully and/or correctly designates the registered legal rents in force for the indicated housing accom-

modations for the periods of time referred to in request No. 3.

VI.

Answering interrogatory No. 1, defendants assume that said interrogatory is directed toward the name of the person now occupying the premises known and designated in Exhibit A attached to plaintiff's complaint. With this assumption, defendants answer that the name of the person or persons now occupying said premises are Mr. and Mrs. Harold Hawkins.

VII.

Answering interrogatory No. 2 said tenants commenced their occupancy of the said premises on the 27th day of December, 1947, and ever since have occupied said premises.

VIII.

Answering interrogatory No. 3, said occupancy was on a monthly basis.

IX.

Answering interrogatory No. 4, $65.00 per month on a monthly basis was collected from said tenants from the 27th day of December, 1947, to and including the month of February, 1949; no rent has been collected from said tenants since said time.

X.

Answering interrogatory No. 5, defendants claim that there was no legal maximum rent during the

occupancy of said tenants from the commencement of his occupancy until the enactment of the Rent Control Act of 1949; the facts upon which said claim is based are fully set forth in defendants' answer to plaintiff's complaint and reference is hereby made thereto.

XI.

These admissions, denials and answer to interrogatories are made by William E. Barden, one of the defendants herein on behalf of all of the defendants for the reason that all of the defendants are associated together and the ownership, management and operation of the property involved herein and as such constitute an association within the meaning of the rules of Civil Procedure.

/s/ WILLIAM E. BARDEN,
For Defendants.

State of California,
City and County of San Francisco—ss.

William E. Barden, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action; that he has read the foregoing admissions, denials and answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are

therein stated on information and belief and as to those matters that he believes it to be true.

/s/ WILLIAM E. BARDEN.

Subscribed and sworn to before me this 19th day of August, 1949.

[Seal] /s/ GUSTAVE RICHMAN,

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed August 23, 1949.

PLAINTIFF'S INTERROGATORIES AND ANSWERS TO PLAINTIFF'S INTERROGATORIES

Interrogatory No. 1

State the name of the person occupying the premises designated in Exhibit A attached to Plaintiff's within and foregoing Complaint.

Answer to Interrogatory No. 1

Defendants assume that said interrogatory is directed toward the name of the person now occupying the premises known and designated in Exhibit A attached to plaintiff's complaint. With this assumption, defendants answer that the name of the person or persons now occupying said premises are Mr. and Mrs. Harold Hawkins.

Interrogatory No. 2

What was the period of said tenant's occupancy?

Answer to Interrogatory No. 2

Said tenants commenced their occupancy of the said premises on the 27th day of December, 1947, and ever since have occupied said premises.

Interrogatory No. 3

Was the occupancy on a weekly or monthly basis?

Answer to Interrogatory No. 3

Said occupancy was on a monthly basis.

Interrogatory No. 4

How much rent was collected for said tenant's occupancy of the designated housing accommodations per week or month as designated in Interrogatory No. 3?

Answer to Interrogatory No. 4

$65.00 per month on a monthly basis was collected from said tenants from the 27th day of December, 1947, to and including the month of February, 1949; no rent has been collected from said tenants since said time.

Interrogatory No. 5

If the defendants do not admit the basic registered maximum rent as set out in the aforementioned Exhibit A to Plaintiff's Complaint, state what the defendants claim the legal maximum rent to be and upon what facts said claim is based.

Answer to Interrogatory No. 5

Defendants claim that there was no legal maximum rent during the occupancy of said tenants from the commencement of his occupancy until the enactment of the Rent Control Act of 1949; the facts upon which said claim is based are fully set forth in defendants' answer to plaintiff's complaint and reference is hereby made thereto.

(Plaintiff's Interrogatories Filed Aug. 3, 1949, Answers to Plaintiff's Interrogatories Filed Aug. 23, 1949.)

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED TO PLAINTIFF BY DEFENDANTS HEREIN

Defendants above named herewith propound the following interrogatories to plaintiff herein under Rule 33 of the Federal Rules of Civil Procedure as amended and herewith demand that said plaintiff answer said interrogatories within fifteen (15) days after the service of the interrogatories upon said plaintiff.

Said interrogatories are as follows:

Interrogatory No. 1: State what acts and/or practices defendants have engaged in which, in the judgment of the Housing Expediter or the Rent Director for San Francisco, constitute or constituted violations of Sections 206(a) of the Housing and Rent Act of 1947 as amended.

Interrogatory No. 2: Give the date or dates of each and all of the acts and practices mentioned in paragraph I of the complaint.

Interrogatory No. 3: State how, or in what manner, each of said acts or practices violates said Section 206(a) of the Housing and Rent Act of 1947 as amended.

Interrogatory No. 4: State in full all evidence relied upon or submitted to the Housing Expediter or Rent Director upon which the said Housing Expediter or Rent Director based his judgment that defendants have engaged in acts and practices constituting a violation of said Section 206(a) of the Housing and Rent Act of 1947 as amended.

Interrogatory No. 5: Give the name or names of each and every person submitting evidence mentioned in Interrogatory No. 5, and state whether such evidence is written or oral—if evidence is written attach copies of all written evidence submitted.

Interrogatory No. 6: State all facts submitted to the Housing Expediter or Rent Director upon which the said Housing Expediter or Rent Director considers the premises at 1760-A Filbert Street, as having been controlled.

Interrogatory No. 7: State when, in the judgment of the Housing Expediter or Rent Director, said premises at 1760-A Filbert Street became controlled and the reasons therefor and state also how long in the judgment of said Housing Expediter or

Rent Director the said premises 1760-A Filbert Street continued to be controlled and whether or not it has ever been decontrolled and not subject to the Rent Regulations or the Housing and Rent Act of 1947.

Interrogatory No. 8: State in detail all evidence which according to notice to landlord of proceedings to determine the maximum rent, evidence has been presented to this office showing that the premises were rented on March 1, 1942, at a rental of $25.00 per month unfurnished with cold water provided; give the evidence upon which said statement was based in detail, stating whether it was oral or written, stating by whom the same was submitted, when the same was submitted, the names and addresses of the person or persons submitting and if written attach copies of such evidence hereto.

Interrogatory No. 9: Give the name and address of each and every witness who has submitted any evidence herein asked to be given in answer to these interrogatories.

Defendants herewith demand that plaintiff by a sworn statement admit the following facts to be true or specifically deny that they are true, admit the truth and the genuineness of the documents herein referred to, as follows, to-wit:

I.

That on or about March 5th, 1948, Henry A. Cross, Rent Director, wrote to William E. Barden,

one of the defendants herein, stating in part as follows: "On the basis of the information submitted on this form, the unit or establishment herein described is decontrolled by the Housing and Rent Act of 1947." That said statement referred to the premises known and designated as 1760-A Filbert Street, San Francisco.

II.

That on December 22nd, 1948, Henry A. Cross, Rent Director, terminated proceedings relating to 1760-A Filbert Street, San Francisco, California, with the following notation: "Terminated Proceedings accommodations occupied previously by manager, rent to be determined under Section 825-5d."

Dated: This 19th day of August, 1949.

/s/ JOHN F. O'SULLIVAN,
Attorney for Defendants.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

NOTICE OF MOTION—MOTION FOR SUMMARY JUDGMENT

Notice of Motion

To the Above-Named Defendants and John F. O'Sullivan, Their Attorney:

You Will Please Take Notice that the undersigned will move this Court at the United States Post Office Building, San Franciso, California, on the 19th day of September, 1949, at 10:00 a.m. of said day, or as soon thereafter as counsel can be heard, for entry of Summary Judgment in this cause.

Motion for Summary Judgment

Plaintiff moves the Court that it enter, pursuant to Rule 56 of the Rules of Civil Procedure, as amended, Summary Judgment in Plaintiff's behalf and against Defendants herein.

This motion is based upon the following papers and documents heretofore filed:

(a) Plaintiff's First Amended Complaint for Injunction and Restitution.

(b) Defendants' Answer Thereto.

(c) Plaintiff's Request for Admissions and Interrogatories.

(d) Defendants' Reply Thereto.

It appears therefrom that this action was commenced by the United States of America on or about

April 27, 1949, by filing a Complaint for Injunction and Restitution with the Clerk of this Court, and that service was made upon Defendant Leitner, through his wife, by the United States Deputy Marshal on or about April 29, 1949.

It further appears that on or about May 6, 1949, Plaintiff filed a First Amended Complaint for Injunction and Restitution with the Clerk of this Court and that service was made upon the Defendants through their attorney, John F. O'Sullivan, by the United States Deputy Marshal on or about May 16, 1949.

It further appears that on July 1, 1949, Defendants filed their Answer to Plaintiff's First Amended Complaint through their aforesaid attorney.

Subsequently, on or about August 3, 1949, Plaintiff's Request for Admissions and Interrogatories were served by mail upon Defendants through their aforesaid attorney, together with a copy of an Affidavit of Service by Mail, copies of which are on file with the Clerk of this Court.

On or about August 23, 1949, Defendants by William E. Barden filed their Reply thereto entitled "Defendants' Admission of Certain Facts Requested by Plaintiff—Denial of the Truth of Certain Facts Requested by Plaintiff—and Answer to Plaintiff's Interrogatories." In their Reply, Defendants admitted all material allegations of Plaintiff's First Amended Complaint save one concerning the applicable legal maximum rent for the housing accommodations in question, as set forth in Schedule "A"

attached to said Complaint. The sole remaining issue is accordingly one of law to be determined by the Court.

Defendants contend that these housing accommodations were not subject to control under the Housing and Rent Act of 1947, relying upon a statement dated March 5, 1948, by Henry A. Cross, Area Rent Director for the San Francisco Bay Defense-Rental Area, to the effect that the accommodations were decontrolled.

That this contention of Defendants is ill-founded is shown by the attached Affidavit of said Henry A. Cross to the effect that his statement of March 5, 1948, had been based on information submitted to the Area Rent Office by Defendant Barden, which information was later shown to have been erroneous. Further, that Defendant Barden was so advised on May 5, 1948, and given an opportunity to substantiate his original statement or explain the error but did not satisfactorily do so. That accordingly, after various administrative proceedings, said Henry A. Cross on February 21, 1949, issued an order finding that the rent for the housing accommodations on the date determining the maximum rent in the San Francisco Bay Defense-Rental Area (namely March 1, 1942) was $25 per month, unfurnished, with cold water provided, which order was made effective from July, 1947, and that the maximum rent for the accommodations has since remained unchanged. Moreover, that a careful review of the records of the Area Rent Office fails to show that the Defendants or

anyone on their behalf has taken any action to avail themselves of the provisions for administrative review of the aforesaid order of February 21, 1949.

It is the Plaintiff's position that the tenant in occupancy during the period essential for decontrol under the Housing and Rent Act of 1947—namely, February 1, 1945, to January 31, 1947, both dates inclusive—was neither in truth nor in fact the manager of the premises. As the attached Affidavit of said tenant Emanuel Leres shows, he was a rent-paying tenant from March, 1942, through July, 1947, and whatever assistance he gave the then owner of the premises was given as a matter of friendship without any remuneration.

Plaintiff moreover submits that Defendants had an adequate remedy at law, but having failed to exhaust the administrative remedies available for review of the aforesaid order of February 24, 1949, under the regulations issued pursuant to the Housing and Rent Act of 1947, cannot now challenge that order.

It is the further position of the Plaintiff that even if said Emanuel Leres were manager of the premises during the period in question, that fact would be immaterial under the Regulations and official Interpretations issued by the Housing Expediter pursuant to the Housing and Rent Act of 1947. Those Regulations and Interpretations provided that occupancy of controlled housing accommodations by a manager or other employee of the owner during the period February 1, 1945, to January 31, 1947,

both dates inclusive, did not remove such accommodations from control under the Housing and Rent Act of 1947. Such Regulations and Interpretations, tending to carry out the said Act as a whole, are controlling and binding upon the Courts unless clearly erroneous or inconsistent with the Act, which Plaintiff submits these Regulations and Interpretations are not.

Wherefore, Plaintiff prays that judgment be rendered forthwith on its behalf, as the Pleadings, Request for Admissions and Interrogatories and Reply thereto, show conclusively that there is no genuine issue remaining as to any material facts, and that the moving party is entitled to a Judgment as a matter of law, as prayed for in Plaintiff's Complaint.

Dated this 9th day of September, 1949.

/s/ WM. B. SPOHN,
Litigation Attorney, Office of the Housing Expediter.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 9, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF HENRY A. CROSS

City and County of San Francisco,
State of California—ss.

Henry A. Cross, being first duly sworn, deposes and says:

That he is the duly appointed and acting Area Rent Director for the Office of the Housing Expediter in the San Francisco Bay Defense-Rental Area.

That in such capacity he is the custodian of all official records and documents pertaining to the controlled housing accommodations in the San Francisco Bay Defense-Rental Area.

That among the controlled housing accommodations on which he maintains official records are those located at 1760-1770 Filbert Street, San Francisco, California.

That such housing accommodations include those designated as 1760-A Filbert Street, San Francisco, California, which William E. Barden as one of the landlords declared in a "Decontrol Report for Housing Accommodations" (Form D-94) dated March 3, 1948, and filed in the Area Rent Office, were

"A dwelling unit which was in existence on February 1, 1945, and which at no time during the period February 1, 1945, to January 31, 1947, both dates inclusive, was rented (other than to members of the immediate family of the occupant) as housing accommodations."

That the affiant on March 5, 1948, advised Barden that on the basis of said information the housing accommodations in question were decontrolled by the Housing and Rent Act of 1947.

That thereafter, by letter dated May 5, 1948, affiant informed Barden that the Area Rent Office had since received a signed statement to the effect that these housing accommodations were not occupied by the landlord during the period in question but had been occupied by one Emanuel Leres and asked that Barden either substantiate his original statement or explain the error. Affiant further advised Barden that if in fact the accommodations were not decontrolled and more than the legal maximum rent were collected therefor, such collection would constitute a violation of the Housing and Rent Act.

That subsequently, Barden, on behalf of himself and F. F. Leitner and Raphael Porta as owners of the housing accommodations, submitted various information to the Area Rent Office, including a petition for adjustment of maximum rental.

That on January 25, 1949, affiant advised the said owners that on the basis of the evidence presented to the Area Rent Office, affiant proposed to enter an order establishing the legal maximum rent of the aforesaid housing accommodations at $25.00 per month, unfurnished, with cold water provided, and informed the owners that they might within ten days file any statement or written evidence concerning the matter which they wished affiant to consider.

That on February 3, 1949, the aforesaid owners filed such a statement through their attorney, John F. O'Sullivan.

That affiant, after consideration of the entire record in the matter, concluded that said statement was insufficient to contravene the evidence of occupancy by the aforesaid Emanuel Leres and affiant accordingly, on February 21, 1949, issued an order (Docket No. J-2548-D) finding that the rent for the aforesaid housing accommodations on the date determining the maximum rent was $25.00 per month, unfurnished, with cold water provided.

That the aforesaid order of affiant, copy of which was mailed to the owners on February 21, 1949, was made effective from July 1, 1947, and that the maximum rent for the housing accommodations in question has since remained in the same amount of $25.00 per month, unfurnished, and with cold water provided.

That a careful review of the records of the Area Rent Office fails to show that the owners or any one on their behalf has taken any action to avail themselves of the provisions of the aforesaid Housing and Rent Act or the Regulations thereunder, for administrative review of affiant's aforesaid order of February 21, 1949.

Dated this 9th day of September, 1949.

/s/ HENRY A. CROSS,
Area Rent Director,
San Francisco Bay
Defense-Rental Area.

Subscribed and sworn to before me this 9th day of September, 1949.

/s/ [Indistinguishable]

The person whose name is subscribed above is officially designated as being authorized to administer oaths pursuant to authority of P.I. 31, 81st Congress (14 Fed. Reg. 2709).

[Endorsed]: Filed September 9, 1949.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of California,
City and County of San Francisco—ss.

William E. Barden, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled matter and as such is familiar with all of the matters and things in this affidavit set forth.

That this affidavit is in answer to the affidavit of Henry A. Cross and the affidavit of Emmanuel G. Leres, both of which have been filed on behalf of the plaintiff in support of its motion for summary judgment in the above entitled matter.

That on the 21st day of April, 1947, affiant notified the Office of Price Administration and the Housing Expediter that the above named defendants purchased the property in which apartment

1760-A Filbert Street was and is located; that thereafter and on the 17th day of May, 1947, affiant filed with the Housing Expediter and Henry A. Cross as Rent Area Control Director a request for prior petition and a petition setting out proposed work to be done; that a prior opinion was issued and signed by said Henry A. Cross on the 20th day of May, 1947, and thereafter Ralph L. Ryan, Area Compliance Supervisor on the 29th of May, 1947, stated to affiant in the form of a letter the relationship between affiant and Emmanuel Leres was of no concern to the Office of Price Administration or to the Housing Expediter and that neither had jurisdiction over the matters relating to the relationship of said affiant as owner and the said Leres.

That Morley Goldberg, Area Rent Attorney, on June 4th, 1947, confirmed the opinion of said Mr. Ryan on the ground that Mr. Leres was acting as manager of the premises for the former owner and that therefore the Housing Expediter and the Office of Price Administration had no jurisdiction over the matter;

That in March, 1948, affiant, together with the other defendants herein, filed their petition denominated Landlords Petition for Adjustment of Rent; that this petition set forth in detail improvements which the defendants herein intended to make upon all of the apartments located at 1760-1770 Filbert Street, San Francisco, California, including the apartment, the subject of this suit, to-wit, 1760-A Filbert Street, San Francisco, California; that said

petition sought the setting of rents and an increase of rents for each and all of said apartments including said apartment 1760-A, and alleged among other things as follows:

"This apartment (1760-A) was occupied prior to January 1, 1945, to and through July 1st, 1947, by an employee of the owner, who served in the capacity of manager of the apartment, consideration of the services and of rent paid by the employee G. Leres. Leres moved out on or about July 1st, 1947, having bought his own home (G.I.), and his whereabouts are presently unknown to petitioners. Programs 2 and 3 were adopted to 1760 with this additional feature. Instead of a frigidaire (the usual 209) model we installed a Servell (gas model, now retailing at $400.00), and installed a large Wedgwood Range. The present tenants agreed in writing to the rental of $65.00.

This petition so far as 1760-A Filbert Street has never been acted upon.

Affiant has further submitted evidence to the said Henry A. Cross, Rent Area Director, consisting of the affidavit of Leo Marchetta, former owner, as to the status of said Emmanuel Leres, which said affidavit clearly showed that said Leres was an employee of said Leo Marchetta during all of the times mentioned from the year 1942 up to the time that said Leo Marchetta sold said property to defendants, namely, in or about April, 1947; that an original duplicate of said affidavit is hereto annexed, hereby referred to and made a part of this

affidavit; that said Leres continued to be an employee of the defendants herein under the same circumstances set forth in the affidavit of Leo Marchetta up to and including the 1st day of July, 1947; that affiant attaches herewith and makes a part hereof the original statement of Charlotte Broderick and Mrs. B. Dahl, each of which affidavits set forth in detail the work that said Leres has done as manager of the aforesaid apartment during the times in this affidavit mentioned.

That affiant and defendants herein have consistently objected to the said Henry A. Cross attempting to impose a maximum rent upon the above apartment for the reason that he had no jurisdiction to do so and that his action at all times was in contradiction to Subdivision 1 of Sub-Section b of Section I of Party 25 of the Rent Regulations under the Housing and Rent Act of 1947 and herein reiterates said position.

In this connection affiant avers that the said Emmanuel Leres was the manager of the said defendants from that the said defendants became the owners of said property up to on or about the 1st day of July, 1947, and did and performed all of the services set forth in the affidavits and statements herein referred to and attached hereto; that affiant heretofore filed a decontrol notice as required by the Office of the Housing Expediter and in accordance with the rules and regulations thereof and that said apartment was decontrolled and has been decontrolled at all of the times herein mentioned

up to and including the enactment of the present Rent Control Act of 1949. Affiant further states that the matters and things set forth in the affidavit of Emmanuel G. Leres, so far as your affiant knows, are untrue.

Wherefore, affiant prays that the motion for summary judgment be denied.

/s/ WILLIAM E. BARDEN.

Subscribed and sworn to before me this 29th day of September, 1949.

[Seal] /s/ CATHERINE T. McDONNELL, Notary Public in and for the City and County of San Francisco, State of California.

AFFIDAVIT

State of California,
City and County of San Francisco—ss.

Leo Marchetta, being first duly sworn, deposes and says: That from December 28, 1939, to and including the 1st day of May, 1947, affiant was the owner of those particular premises located at 1760-1770 Filbert Street, San Francisco, California. That some time in 1942, the exact date of which affiant does not remember, affiant permitted a relative of his, to-wit: Mrs. E. G. Leres, and her husband E. G. Leres, to occupy apartment Number 1760 Filbert Street under condition that they or either of the said Leres, should conduct the operation of the said

premises in the capacity of full responsibility of managership; that thereupon the said Leres persons began the occupancy of said apartment Number 1760 Filbert Street; that it was agreed between affiant and said Leres persons that in consideration of the full time as needed in the managing of said apartment being bestowed by said Leres persons, that no rental hire of said property should be demanded by affiant from Leres persons or either of them; that at said time affiant was not living upon nor occupying any apartment in said structure. That said occupancy without hire continued for a period of time well into the year of 1945; that said Leres persons exercised all functions of managership of said apartment-house 1760-1770 Filbert street; that during the year 1943, said E. G. Leres was left alone in said apartment with minor son of said Leres persons; that the duties theretofore performed by said E. G. Leres and Mrs. E. G. Leres were continued to be performed by E. G. Leres; that on or about the middle of the year 1945, on or about April 15, 1945, affiant announced to the said Mr. and Mrs. E. G. Leres that he, affiant would collect all of the rentals from the tenants on said premises, but that said Leres persons could remain as maintenance persons on said premises and in the same amount and degree of labor and services as theretofore by them performed, saving and excepting for the said collecting of rentals from tenants; that thereafter, down to and including the 18th day of April, 1947, said E. G. Leres and Mrs.

E. G. Leres, or either of them, did perform the following services as a part consideration for their use of the said apartment 1760 Filbert Street, to-wit: Supervising the light-control switch, turning off and on as the time warranted it, the light for the hall way in said apartment building for all 16 apartments; sweep hallway and steps into the Filbert Street entrance; cleaning up and maintaining clean the concourse under the back porches and to the rear or easterly side of the premises; distributing to all tenants the shopping news papers when and as delivered in a lump bundle at the door of 1760 Filbert street; make minor repairs to facilities in apartments of all tenants, not requiring major work or labor by journeymen, such as repair leaky water faucets, replace faulty washers; replace burned out globes where needed; keep supply of globes on hand to use in replacements where needed; show vacant apartments to prospective tenants; answer complaints of tenants, and attempt to work out difficulties between tenants; assist utilities men when unacquainted with tenants and their respective service meters; keep garbage cans covered and arrange for removal of garbage when unusual situation arose other than ordinary; compel the removal of noisy, boisterous persons other than tenants when they would and did congregate in foyer of apartment house, or on landings; keep rear concourse free from rubbish and clean up the same; and police up the same, allowing only those who had lawful business in any of such storeroom to visit the same;

accept on behalf of the tenants packages for the convenience of tenants when tenants were away; accept phone messages for the tenants, and call tenants to the phone when tenants had no phone of their own; said phone was in the apartment of E. G. Leres; admonish noisy and boisterous persons, tenants or guests of tenants, when noise complained of by other tenants; occasionally collected rentals from the tenants when affiant was not on the premises, and particularly when affiant was in hospital during month of October, 1946. That said Leres persons, or either of them did perform the foregoing services on behalf of affiant until the sale by affiant of the said premises to F. F. Leitner on April 18, 1947.

/s/ LEO MARCHETTA.

Subscribed and sworn to before me this 7th day of June, 1948.

[Seal] /s/ ARTHUR J. HEALY,

Court Commissioner for the Superior Court of the State of California, in and for the City and County of San Francisco.

Statement of Facts Concerning 1760 Filbert Street Regarding Mr. and Mrs. Leres Prior to Purchase of the Property by Mr. Leitner

The undersigned was a tenant in the apartment house at 1760-1770 Filbert Street, San Francisco, for some considerable time prior to April 18, 1947; Mr. Leo Marchetta was the owner of the property

and occupied the apartment second from the street; on many occasions, and for some periods of time he was indisposed; during his indisposition and while he was sick and was not around the premises other persons named Mr. and Mrs. E. G. Leres would substitute for him. Leres lived at 1760 Filbert St., the first lower apartment. These are some of the things the undersigned observed the Leres persons to perform during Mr. Marchetta's indisposition:

1. Leres had control of the lighting of the halls in front of all the lower apartments at the entrances.

2. Leres swept and cleaned the hallway and the steps on westerly side, that is the front of the apartments.

3. Leres cleaned the concrete concourse on the easterly (back) side of the apartment house.

4. Leres distributed the "Shopping News" to the several apartments; the papers were left in a bundle at Leres apartment by the delivery boy, and then distributed by Leres.

5. Leres repaired leaky faucets, and did minor details around apartments, such as replacing faulty washers, etc.

6. Leres replaced burned-out globes, in halls and apartments.

7. Leres answered complaints of tenants, and spoke to visitors when they came onto the hallway.

8. Leres kept the garbage-disposal containers covered.

9. Leres determined who were undesirable persons who came upon the premises and compelled them to depart; this particularly as to children who otherwise would use the hallway for a playground.

10. Leres supervised entrance and egress from the storerooms, letting tenants in and out of the same, and saying what, when and how things could be stored therein.

11. Leres accepted packages from delivery boys on behalf of tenants who may have been absent, and delivered them (the packages) to the tenants upon their return.

12. Leres had a phone in his apartment; other tenants were not able to have a phone installed, or did not care to do so, and Leres would accept a message for the tenant, and would either relay it to the tenant, or would call the tenant to the phone in Leres apartment.

13. When keys would be lost, Leres would see to it that substitute keys would be had.

14. When Marchetta was in hospital, Leres collected the rent money from tenants on behalf of Marchetta.

The foregoing statements of fact are calculated to indicate that either Mr. or Mrs. Leres occupied a position of trust in so far as Mr. Marchetta is

concerned and performed some of the duties of manager of the whole apartment house.

/s/ CHARLOTTE BRODERICK,
Tenant.

Statement of Facts Concerning 1760 Filbert Street Regarding Mr. and Mrs. Leres Prior to Purchase of the Property by Mr. Leitner

The undersigned was a tenant in the apartment house at 1760-1770 Filbert Street, San Francisco, for some considerable time prior to April 18, 1947; Mr. Leo Marchetta was the owner of the property and occupied the apartment second from the street; on many occasions, and for some periods of time he was indisposed; during his indisposition and while he was sick and was not around the premises other persons named Mr. and Mrs. E. G. Leres would substitute for him. Leres lived at 1760 Filbert St., the first lower apartment. These are some of the things the undersigned observed the Leres persons to perform during Mr. Marchetta's indisposition:

1. Leres had control of the lighting of the halls in front of all the lower apartments at the entrances.

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bundle at Leres apartment by the delivery boy, and then distributed by Leres.

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8. Leres kept the garbage-disposal containers covered.

9. Leres determined who were undesirable persons who came upon the premises and compelled them to depart; this particularly as to children who otherwise would use the hallway for a playground.

10. Leres supervised entrance and egress from the storerooms, letting tenants in and out of the same, and saying what, when and how things could be stored therein.

11. Leres accepted packages from delivery boys on behalf of tenants who may have been absent, and delivered them (the packages) to the tenants upon their return.

12. Leres had a phone in his apartment; other tenants were not able to have a phone installed, or did not care to do so, and Leres would accept a message for the tenant, and would either relay it to the tenant, or would call the tenant to the phone in Leres apartment.

13. When keys would be lost, Leres would see to it that substitute keys would be had.

14. When Marchetta was in hospital, Leres collected the rent money from tenants on behalf of Marchetta.

The foregoing statements of fact are calculated to indicate that either Mr. or Mrs. Leres occupied a position of trust in so far as Mr. Marchetta is concerned and performed some of the duties of manager of the whole apartment house.

/s/ MRS. B. DAHL,
Tenant.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES

1. It is not necessary to exhaust administrative procedure when order of administrative body or individual is void.

Aaron v. Pennsylvania Railroad Co., 80 Fed. 2d, 100.

Euclid v. Amber Realty Co., 71 Law Ed. 303.

2. Opinions of administrative bodies and interpretations thereof not binding when clearly against plain explicit language of law or regulations.

Receipt of copy attached.

[Endorsed]: Filed September 29, 1949.

[Title of District Court and Cause.]

SIDNEY FEINBERG,
WILLIAM B. SPOHN,
180 New Montgomery Street,
San Francisco 5, California,
Attorneys for Plaintiff.

JOHN F. O'SULLIVAN,
1500 Central Tower,
San Francisco, California,
Attorney for Defendants.

Erskine, District Judge.

MEMORANDUM OPINION

Plaintiff's action, brought under authority of Section 206 of the Housing and Rent Act of 1947 as amended, is for an injunction against violation of said Act and for restitution to the tenants entitled thereto of all amounts in excess of the lawful maximum rent on the premises involved which have been demanded or received by the defendants.

In answer the defendants allege that from March, 1942, through July 12, 1947, the premises were occupied by one Leres as compensation for services rendered as servant, caretaker, and manager, and therefore were exempt from rent controls by virtue of certain provisions of the Act. In answer to plaintiff's interrogatories, defendants further admit collecting $65.00 per month rent from January 1, 1948, to and including February, 1949, from Mr. and

Mrs. Merald Hawkins, the tenants occupying the premises at the commencement of the action, but deny that the premises are or ever were under control, because of the said exemption provisions of the statute.

Plaintiff now moves to strike defendants' interrogatories and for summary judgment under Rule 56 of the Federal Rules of Civil Procedure on the ground that there is remaining no genuine issue as to material facts, but that, assuming the facts to be as alleged or admitted by the defendants the only question remaining is one of law. This appears to be the case, and the only question for this court is whether, under the applicable sections of the statute, the premises in question were subject to maximum rental ceilings during the period from January 1, 1948, to and including February, 1949.

Under the terms of the Housing Act of 1947, the term "controlled housing accommodations" does not include any housing accommodations which for any successive 24 month period (between February 1, 1945, and March 31, 1948) were not rented (other than to members of the immediate family of the landlord) as housing accommodations. 50 USCA 1892 (c) (3) (B). In other words, if the apartment was held vacant, occupied by the landlord, or rented only to members of the landlord's immediate family it is not subject to control under the 1947 Act. It should be noted that the statute does not state that any housing accommodations not subject to the maximum rent regulations for two years would be decontrolled.

The statute further provides that "Rent" means the consideration, including any bonus, benefit, or gratuity demanded or received for or in connection with the use or occupancy of housing accommodations. 50 USCA 1892(e).

Section 1(b)(2) of the Rent Regulations issued under the authority of the Housing and Rent Act of 1947 states that the regulations do not apply to "dwelling space occupied by domestic servants, caretakers, managers or other employees to whom the space is provided as part or all of their compensation, and who are employed for the purpose of rendering services in connection with the premises of which the dwelling space is a part." (12 F. R. 4331.) These regulations were not to apply to such service employees' accommodations for the reason that it was expected that such employees would be paying little or no rent, and it was desired to free such accommodations from the other types of regulations such as those pertaining to minimum space, services, furniture, inspection, and registration.

The Housing Administrator has interpreted the statute and the regulations in the following manner: "Where during the two year period housing accommodations were rented under circumstances which caused the renting to be exempt from the rent regulations, the mere fact that such an exemption existed does not result in decontrol. For example, where the housing accommodations were occupied during the two year period by a janitor, the housing

accommodations, so long as this situation existed, were exempt from the rent regulations. If, however, after the expiration of the two year period, the housing accommodations are no longer occupied by a janitor under such an arrangement, but are rented to a tenant under an ordinary rental agreement, the exemption (from the regulations) ceases to apply and the question arises whether they are decontrolled on the basis that they had not been 'rented' during the two year period. Such housing accommodations are not decontrolled on that basis because, even though they were exempt during the two year period, they were rented during that period to a person who was not a member of the landlord's immediate family." It is only the latter class of persons rental to whom will not bar decontrol at the end of the two year period.

Thus, under the Aministrator's interpretation, the premises involved herein, though not subject to the rental regulations during the period of the occupancy of the caretaker-manager, were not decontrolled at the end of such occupancy. This interpretation was followed by the District Court of the Southern District of California in the case of Woods v. Landowne, No. 9110-W, April 22, 1949, and would appear to be correct. In view of the definition of "rent" in the statute and in the regulations, accommodations occupied by a service employee as part or all of his compensation is "rented" and therefore not decontrolled. Administrative interpretation of regulations is of controlling weight

unless plainly erroneous or inconsistent with the regulations.

Bowles v. Seminole Rock Co., 325 U. S. 410.

Likewise, the regulations being in full accord with the statute, cannot be overturned.

Defendants rely as a defense upon certain statements and advice given by the Office of Housing Administration in March of 1948 to the effect that the premises involved were decontrolled by the Housing and Rent Act of 1947. However, it appears that such representations were made on the basis of a "Decontrol Report for Housing Accommodations" filed by the defendant Barden, which stated that the dwelling unit was "at no time during the period February 1, 1945, to January 31, 1947 . . . rented (other than to members of the immediate family of the occupant [sic]) as housing accommodations." Under the admitted facts, this statement was not true, as a matter of law; consequently the defendant had no right to rely upon any statement by the local Housing Administration officials. Moreover, it is a general rule that an administrative determination does not constitute an estoppel against the United States.

Walker-Hill Co. v. U. S., 162 F. (2d) 259, cert. den. 332 U. S. 771.

In the light of the admitted facts and the above conclusions of law, it is the opinion of the court that the plaintiff's motions to strike the defendants' interrogatories and for summary judgment should

be granted. Decree in accordance with this opinion will be entered.

Dated: October 12th, 1949.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed October 12, 1949.

United States District Court for the Northern District of California, Southern Division

No. 28814-E

UNITED STATES OF AMERICA,

Plaintiff,

vs.

F. F. LEITNER, also known as S. F. LEITNER, also known as FREDERICK LEITNER, RAPHAEL PORTA, and WILLIAM E. BARDEN,

Defendants.

JUDGMENT AND DECREE

The above-entitled cause came regularly on for hearing before this Court on the 3rd day of October, 1949, the Honorable Herbert W. Erskine, Judge presiding, on Plaintiff's Motions to Strike Defendant's Interrogatories and for Summary Judgment, Plaintiff appearing by its counsel William B. Spohn, and Defendants by their counsel John F. O'Sullivan; and

The facts having been admitted in the pleadings and the conclusions of law stated stated in the Memorandum Opinion of the Court dated October 12, 1949,

Wherefore, It Is Ordered, Adjudged and Decreed that the Defendants F. F. Leitner, also known as S. F. Leitner, also known as Frederick Leitner, Raphael Porta, and William E. Barden be and they hereby are required and directed to forthwith make restitution to the Plaintiff on behalf of the tenants Mr. and Mrs. Merald B. Hawkins overcharged by said Defendants for rental of the housing accommodations specified in this cause, the sum of Six Hundred and no/100 Dollars ($600.00) together with Plaintiff's costs herein in the sum of Forty-three and 24/100 Dollars ($43.24), said payments to be made to the Treasurer of the United States at the office of the Litigation Section of the Office of the Housing Expediter, San Francisco Regional Office, 180 New Montgomery Street, San Francisco 5, California.

It Is Further Ordered, Adjudged and Decreed that the Defendants F. F. Leitner, also known as S. F. Leitner, also known as Frederick Leitner, Raphael Porta, and William E. Barden, their attorneys, agents, servants, employees and all other persons in active concert or participation with the Defendants, be and they hereby are permanently enjoined and restrained from directly or indirectly demanding or receiving rents in excess of the maximum rents established by any regulation or order

heretofore or hereafter adopted pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended, or extended, or superseded, or from engaging in any acts or practices which constitute or will constitute a violation of the said Housing and Rent Act or of any regulation or order adopted pursuant thereto.

Dated this 21st day of December, 1949.

/s/ HERBERT W. ERSKINE,
Judge, U. S. District Court.

Lodged December 8, 1949.
[Endorsed]: Filed December 21, 1949.
Entered in Civil Docket Dec. 22, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that F. E. Leitner, also known as S. F. Leitner, also known as Frederick Leitner, Raphael Porta, and William E. Barden, defendants above named, hereby appeal to the Court of Appeals for the Ninth Circuit from the decree and judgment entered in this action on the 22nd day of December, 1949, and from the whole of said decree and judgment.

Dated: This 30th day of January, 1949.

/s/ JOHN F. O'SULLIVAN,
Attorney for Defendants
and Appellants.

[Endorsed]: Filed February 2, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

Defendants above named hereby designate the following documents as those to be contained in the record on its appeal from the order of Honorable Herbert W. Erskine dismissing the above entitled action and from the judgment of costs entered against defendants in said action, namely:

1. Amended complaint.

2. Answer to amended complaint.

3. Interrogatories to be answered by defendants.

4. Answer to interrogatories.

5. Interrogatories to plaintiff and admissions requested from plaintiff.

6. Motion for summary judgment by plaintiff.

7. Affidavit of Henry A. Cross in support of motion.

8. Affidavit of William E. Barden in opposition for summary judgment, together with exhibits attached thereto.

9. Memorandum Opinion of Court granting motion for summary judgment.

10. Judgment in favor of plaintiff and against defendants.

11. Notice of Appeal.

12. Designation of contents of Record on Appeal.

You Are Hereby Requested to prepare said documents and make the same a part of said record.

Dated: This 30th day of January, 1950.

/s/ JOHN F. O'SULLIVAN,
Attorney for Defendants
and Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed February 2, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

First Amended Complaint for Injunction and Restitution, and Exhibit "A."

Answer to First Amended Complaint for Injunction and Restitution.

Plaintiff's Request for Admission and Plaintiff's Interrogatories.

Defendants' Admission of Certain Facts Requested by Plaintiff—Denial of the Truth of Certain Facts Requested by Plaintiff—and Answers to Plaintiff's Interrogatories.

Plaintiff's Interrogatories and Answers to Plaintiff's Interrogatories.

Interrogatories Propounded to Plaintiff by Defendants Herein.

Notice of Motion and Motion for Summary Judgment.

Affidavit of Henry A. Cross.

Affidavit in Opposition to Motion for Summary Judgment (Affidavit of William E. Barden).

Memorandum Opinion.

Judgment and Decree.

Notice of Appeal.

Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 8th day of March, A.D. 1950.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12494. United States Court of Appeals for the Ninth Circuit. F. E. Leitner, also known as S. F. Leitner, also known as Frederick Leitner, Raphael Porta and William E. Barden, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 8, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the Court of Appeals of the United States
Ninth Circuit

No. 12494

UNITED STATES OF AMERICA,

Plaintiff,

vs.

F. F. LEITNER, also known as S. F. LEITNER, also known as FREDERICK LEITNER, RAPHAEL PORTA, and WILLIAM E. BARDEN,

Defendants.

STATEMENT OF POINTS UPON WHICH DEFENDANTS AND APPELLANTS INTEND TO RELY ON APPEAL.

The appellants, F. F. Leitner also known as S. F. Leitner, Frederick Leitner, Raphael Porta, and

William E. Barden, defendants in the above entitled action hereby state that the following are the points upon which they intend to rely upon their appeal from the judgment in said action:

I.

That the record in this case shows that there was a genuine issue as to material facts and that the motion for summary judgment should not be granted.

II.

That the record in this case shows that the premises involved were decontrolled and not subject to control for the reason that they were not rented during the period and inclusive of February 1, 1945, to the date of the enactment of the Housing and Rent Act of 1948 to wit, March 30, 1948, both dates inclusive.

III.

That the interrogatories proposed by defendants and ordered stricken by the Court were properly directable to issues of material facts in the case.

Appellants request the whole record be printed.

Dated: This 20th day of March, 1950.

/s/ JOHN F. O'SULLIVAN,
Attorney for Defendants and Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed March 22, 1950.

No. 12,494

IN THE

United States Court of Appeals

For the Ninth Circuit

F. E. LEITNER, also known as S. F. Leitner, also known as Frederick Leitner, RAPHAEL PORTA and WILLIAM E. BARDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

JOHN F. O'SULLIVAN,
1500 Central Tower, San Francisco 3, California,
Attorney for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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IN THE

United States Court of Appeals

For the Ninth Circuit

F. E. LEITNER, also known as S. F. Leitner, also known as Frederick Leitner, RAPHAEL PORTA and WILLIAM E. BARDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

STATEMENT OF JURISDICTIONAL FACTS.

The complaint, count 1, shows the action to be one brought under Sections 205, 206b and 206c of the Housing and Rent Control Act of 1947, as amended. (Public Law 31, 81st Congress, 1st session.) This Act grants jurisdiction of this type of action to the District Court. The complaint also shows that the defendants were the owners of and operated the apartment house in question and that the apartment house was located in the City and County of San Francisco,

State of California, within the confines of the Southern Division of the Northern District of California. (Record, pages 2, 3.)

The jurisdiction is vested in the United States Court of Appeals by virtue of Section 1291, Title 28, United States Code.

II.

STATEMENT OF THE CASE.

The District Court granted a motion for summary judgment upon the application of the appellee. The position of the appellee was, conceding the truth of the facts alleged in the affidavit of opposition to motion for summary judgment and the answers to interrogatories and demand for admissions, nothing but a question of law remained and judgment should be rendered in favor of appellee.

The affidavit of William E. Barden in opposition to motion for summary judgment shows that one Emmanuel G. Leres, acted as an employee of appellants and appellants' predecessor in interest in the capacity of general manager and handy-man of the apartment house located at 1760-1770 Filbert Street, San Francisco, California, and received as his compensation the use of the apartment 1760-A (R. p. 30); that this employment continued up to the 1st day of July, 1947, and commenced at sometime in 1942. The interrogatories and the answers to demand for admission show that after the 1st day of July, 1947, the apart-

ment was vacated by Mr. Leres and rented to a Mr. and Mrs. Herald Hawkins on the 27th day of December, 1947. (R. pp. 12-18.)

The record also shows that the Court, in addition to granting a motion for summary judgment, struck from the record appellants' interrogatories and demand for admissions. (R. p. 47.)

There are two main questions presented here, first, was the use of the apartment by Emanuel Leres in connection with the services he rendered a rental or a compensation for his services; second, if it be adjudged that the use of the apartment under the circumstances related was compensation for the services of Emmanuel Leres, was the apartment decontrolled by virtue of the provisions of the Housing and Rent Control Act of 1947?

III.

ARGUMENT.

It is fundamental that a summary judgment can only be granted where there is no genuine question of material fact and the sole question remaining is one of law for the Court.

Fartor v. Arkansas Nat'l Gas Corp., 321 U. S. 620, 88 L. Ed. 967;

International Salt Co., Inc. v. U. S., 332 U. S. 392;

Eccles v. Peoples Bank, etc., 333 U. S. 426, 92 L. Ed. 784.

Under the above rule, therefore, the Court was required to take as true the testimony contained in the affidavit of appellants in opposition to the motion for summary judgment. This affidavit showed Emmanuel Leres to have been employed to render certain designated services to appellants and to appellants' predecessors in interest for which he received the use of his apartment.

It is said in *Schumann v. California Cotton Credit Corp.,* 105 Cal. App. 136 at 141:

> "Wage is compensation for services rendered, and this compensation may take the form of money paid or other value given, such as board, lodging or clothes. (18 R.C.L. 530; 39 Cor. Jur. 160; Hancock v. Yaden, 121 Ind. 366, 16 Am. St. Rep. 396, 6 L.R.A. 576, 23 N.E. 253; Moulin v. Columbed, 22 Cal. 508.)"
>
> *Adcock v. Smith,* 37 S.W. 91.

In the case of *Maio v. Borrell,* 83 N.Y.S. (2d) 532, we find the following:

> "(Syl) Where at times superintendent of an apartment house was employed, owner offered him an apartment and a monthly stipend, and superintendent preferred another apartment which owner agreed to let him occupy if monthly stipend was reduced, but there was no express agreement creating tenancy, occupancy of apartment by superintendent was an incident of his employment and conventional relationship of landlord and tenant did not exist."
>
> *Prince v. Davis,* 87 N.Y. Supp. 2nd series 600.

From the foregoing it is apparent, therefore, that under the evidence contained in the affidavit in opposition to motion for summary judgment there was no rental by Leres of the apartment in question. It is also apparent that Leres occupied the apartment for more than twenty-four months continuously after the 1st day of February, 1945.

As to the second question involved, under the terms of the Housing Act of 1947 the term "Controlled Housing Accommodations" does not include any housing accommodations which for twenty-four successive months, that is between February 1, 1945 and March 31, 1947, were not rented other than to members of the immediate family of the landlord as housing accommodations. (50 U.S.C.A. 1892 (c)(3)(b).) Under the provisions of this section of the Act, if the apartment were held vacant, occupied by the landlord, not rented or rented only to the members of the landlord's immediate family, it is not subject to control under the 1947 Act.

This was recognized by rent regulations issued under the Housing and Rent Act of 1947. Subdivision 2(b) of Section 1 of Part 825.10 of these regulations provides as follows:

> "Housing to which this regulation does not apply. This regulation does not apply to the following: * * * to service employees' dwelling space occupied by domestic servants, caretakers, managers, or other employees to whom the space is provided as part or all of their compensation and who are employed for the purpose of rendering services

in connection with the premises of which the dwelling space is a part."

Section 202, Subdivision (c) provides:

"The term 'controlled housing accommodations' means housing accommodations in any defense rental area, except that it does not include— * * * (B) 3(B) which for any successive twenty-four month period during the period February 1, 1945 to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations;"

The crucial word in the above last mentioned section is the word rented. If the housing accommodations were not rented then they were decontrolled and were not subject to the provisions of the Act.

Under the authorities above quoted and cited, there was no renting during the period from 1942 to and including July 1, 1947. On the contrary, there was a payment of wages by the use of the apartment. This period was for a period for more than twenty-four successive months and falls squarely within the last quoted provision of the Act. Therefore the apartment in question was not subject to the provisions of the Act and the motion for summary judgment should have been denied.

A case directly in point coming from the State of New York, is the case of *Prince v. Davis,* 87 N.Y. Supp. 2nd series, 600, commencing with 602. There it was said:

"The landlords have instituted a summary proceeding in this Court in statutory form based upon non-payment of rent by the tenant. The answer is in the form of a general denial coupled with an affirmative defense that 'the rent demanded herein is not that to which the landlord is entitled under the O.H.E. Rent Regulations for housing in the Westchester area.' The facts have been stipulated. It is conceded that the demised premises were occupied by a superintendent in the employ of the landlords or their predecessors in title from June, 1944 to October 11, 1948 and in fact for a period of 12 years prior to October 11, 1948, the enjoyment of the premises being part of the compensation paid to the superintendents. The parties are in agreement that the demised premises were exempt from rent control while so occupied by employees of the landlord to and including October 11, 1948. The position of the tenant, supported by the Office of the Housing Expediter who has appeared in these proceedings by counsel, is that with the termination of the employee occupancy, the premises became subject to rent control.

(1) Implicit in the stipulation of facts is a finding that the premises were not rented for any successive 24 months period during the period February 1, 1945 to March 30, 1948, both dates inclusive. Furthermore, there is nothing in the stipulated facts to establish that the occupancy of the apartment by the employees of the owners of the building at any time between the effective rent date and the date of the commencement of the proceeding was other than part of an employer, employee relationship. There is no proof that the relationship of landlord and tenant ever

existed with respect to these premises prior to the making of the agreement between the landlord and the named tenant in these proceedings. By the language of the Housing and Rent Act of 1947, as amended by Public Law 422, and by the Housing and Rent Act of 1948, 50 U.S.C.A. Appendix, § 1881 et seq. the term 'housing accommodations' refers to a building or the portions thereof 'rented or offered for rent for living or dwelling purposes' Section 202 (b). Since the relationship of landlord and tenant with respect to the demised premises never existed prior to October 12, 1948 when the agreement of tenancy was made with the named tenant in this proceeding, the demised premises clearly were not 'housing accommodations' on the effective rent date in this area.

(2) Furthermore, in defining the term 'controlled housing accommodations' the statute, Section 202(c), expressly excludes any housing accommodations 'which for any successive twenty-four month period during the period February 1, 1945, to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented * * * as housing accommodations' so that even if, independent of the absence of the relationship of landlord and tenant with respect to the superintendent's apartment, it would be considered 'housing accommodations' under subdivision (b), it clearly is removed from the term 'controlled housing accommodations' in this instance.

(3) Furthermore, this is clearly the first rental undertaken with respect to these premises since the effective rent date in this area, which as such,

is subject to no limitation upon the amount which an owner may ask for the first renting of a housing accommodation after termination of its non-controlled status. Levin v. Rosenkrantz, ... Misc. ....., 86 N.Y.S. (2d) 271, 273; Section 4 Subdivision (c) of Section 825.2 Rent Regulations. In reading Regulation B3 entitled 'Controlled Housing Rent Regulation', including amendments 1 to 32 issued July 1, 1948 we again find in Section 1 Subdivision (b) and then (ii) entitled 'Service Employees', that dwelling space, such as is involved herein, which was occupied by domestic servants as part or all of their compensation, is declared to be exempt housing and in Subdivision (c) of Section 4 of the same regulation we find that 'for controlled housing accommodations first rented on or after July 1, 1947, the maximum rent shall be the first rent for such accommodations.'

With the clear language of the statute before us and with the language of the official interpretation so given, it would seem that there could be no question left to be decided and that the rent established by this first rental agreement after July 1, 1947, should be held to constitute the lawful rent."

The premises in question therefore were clearly decontrolled. The record shows they were rented for the first time on December 27, 1947. Under regulation No. 825.2, they were subject to no limitation upon the amount which the appellants could ask for the first renting and therefore not subject to the action of the appellee housing expediter in this instance.

IV.

CONCLUSION.

We respectfully submit, therefore, that the record in this case discloses that there was a genuine issue as to material facts and that the judgment of the District Court should be reversed with direction that the motion for summary judgment be denied.

Dated, San Francisco, California,
May 17, 1950.

Respectfully submitted,
JOHN F. O'SULLIVAN,
Attorney for Appellants.

No. 12494

In the United States Court of Appeals for the Ninth Circuit

F. E. LEITNER, ALSO KNOWN AS S. F. LEITNER, ALSO KNOWN AS FREDERICK LEITNER, RAPHAEL PORTA, AND WILLIAM E. BARDEN, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLEE

ED DUPREE,
General Counsel.
LEON J. LIBEU,
Assistant General Counsel.
LOUISE F. McCARTHY,
Special Litigation Attorney.
Office of the Housing Expediter,
Washington 25, D. C.

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No. 12494

F. E. LEITNER, ALSO KNOWN AS S. F. LEITNER, ALSO KNOWN AS FREDERICK LEITNER, RAPHAEL PORTA, AND WILLIAM E. BARDEN, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

The United States of America instituted suit for restitution of rent overcharges and an injunction against the above-named appellants pursuant to Section 206 (a) of the Housing and Rent Act of 1947, as amended (50 U. S. C. App. 1881 et seq., P. L. 31, 81st Cong., 1st Sess.) (R. 2). Jurisdiction of the District Court is conferred by Section 206 (b) and 206 (c) of said Act (R. 2). Jurisdiction of this Court is conferred by Section 1291 of the Judicial Code (28 U. S. C. 1291).

COUNTERSTATEMENT OF FACTS

This suit arises out of an alleged violation of the Housing and Rent Act of 1947 to which defendants

interpose a defense of decontrol under Section 202 (c) (3) (B) of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948 (50 U. S. C. App. 1892) which reads as follows:

> The term "controlled housing accommodations" * * * does not include—
>
> (3) any housing accommodations * * * (B) which for any successive twenty-four month period during the period February 1, 1945, to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations; or[1]

From March 12, 1942 through July 12, 1947, Apartment 1760–A Filbert Street, San Francisco, California was occupied by Emmanuel G. Leres who paid no money rent but received the right to occupy it as compensation for services rendered to the owner (R. 43). Appellants contend that such occupancy is not a rental. Appellee contends that it is a rental. Both parties agree that if the apartment was rented, there has been no decontrol since this occupancy covered 30 of the 38 months included in Section 202 (c) (3) (B). If the apartment was not rented, both parties agree that it was decontrolled at the time the actions here complained of took place even though it may subsequently have been recontrolled under the amendments to the Housing and Rent Act of 1947,

[1] The effective date was March 30, 1948. The section was again amended by the Housing and Rent Act of 1949 (P. L. 31, 81st Cong., 1st Sess.) to eliminate the exemption from control relied on by defendant.

effected by the Housing and Rent Act of 1949 (P. L. 31, 81st Cong., 1st Sess.).

After Leres ceased to occupy the apartment it was rented to Mr. and Mrs. Merald B. Hawkins from January 1, 1948, to April 1, 1949 at the rate of $65 per month. The maximum legal rent as established by order dated February 21, 1949 and made retroactive to July 1, 1947 was $25 per month (R. 29), and if there were any unlawful overcharges they amounted to $600 (R. 49). The housing accommodation, if decontrolled, again became subject to rent control on April 1, 1949, when subsection (3) (B) of Section 204 (c) was deleted from the Housing and Rent Act of 1947 by Section 201 (c) of the 1949 Act. This suit deals only with overcharges prior to April 1, 1949.

SUMMARY

Although appellants designated three points on appeal, they have abandoned two and rely only on the contention that the Court was in error in granting a motion for summary judgment on the admitted facts. Appellee contends that the action of the Court below was proper because a housing accommodation is rented under the Housing and Rent Act of 1947 and the regulations issued pursuant thereto when occupied by an employee as compensation for services. The definition of rent in the Housing and Rent Act of 1947 is the same as that included in all rent control regulations and differs from that in the Emergency Price Control Act only by being more complete. Congress approved the broader language

contained in the regulation issued under the 1942 Act by incorporating it in the 1947 Act.

The services performed by the manager were rent since they were a benefit to the landlord. Rent is not necessarily money. The fact that the apartment was exempt from control by administrative regulation does not alter the fact that it was rented under the Act. The regulations exempted a number of types of rented accommodations. The 1947 Act decontrols certain specified accommodations not rented but these decontrol provisions do not apply to accommodations rented but exempt from control under previous regulations.

The correctness of this position is evidenced by an official interpretation of the Housing Expediter which should control unless plainly erroneous or inconsistent with the Act. Two District Court cases sustain this position. The cases cited by appellants are either inapplicable or wrongly decided. They ignore the fact that the meaning and application of a federal statute are governed by federal, not local law. The judgment below should be affirmed.

ARGUMENT

I

The points on appeal designated by appellants, but not argued in their brief, should be treated as abandoned

Appellants have specified three points on which they intended to rely on appeal, namely:

1. The motion for summary judgment was improper because there was a genuine issue of material fact.

2. The record shows that the premises involved were decontrolled because they were not rented from February 1, 1945 to March 30, 1948, both dates inclusive.

3. The interrogatories proposed by defendants and ordered stricken by the Court were properly directable to issues of material facts in the case.

The appellants' brief is directed solely to a slightly modified version of their second point, namely, that the premises were decontrolled because they were not rented for twenty-four consecutive months, between February 1, 1945 and March 30, 1948, the actual period in controversy being the period of occupancy of Emmanuel G. Leres extending from February 1, 1945, to July 1, 1947, or a period of 30 months.

Since the other two points have not been included or argued in appellants' brief as required by Rule 20 (f) of the Rules of this Court, they should be treated as having been abandoned.

Martin v. *Sheely,* 144 F. 2d 754, 756 (C. A. 9).

Stetson v. *United States,* 155 F. 2d 359, 361 (C. A. 9).

Western National Ins. Co. v. *LeClare,* 163 F. 2d 337, 340 (C. A. 9).

II

The Court below correctly concluded that the apartment at 1760–A Filbert Street, San Francisco, California, was rented for thirty of the thirty-eight months included in the period from February 1, 1945, to March 30, 1948, both dates inclusive, and was therefore subject to rent control.

Appellee agrees with appellants that on a motion for summary judgment the facts stated in appellants'

affidavit in opposition to the motion must be taken as true. Appellee further agrees that Emmanuel G. Leres must be regarded as having been permitted to occupy the apartment at 1760–A Filbert Street as compensation for his services. However, appellee does not agree that such occupancy by Leres as compensation was not also a renting to Leres under the definition of "rent" in the applicable acts and regulations. Under the definition of rent contained in the Housing and Rent Act of 1947, as amended, the occupancy is a rental even though it is also compensation. The two are not mutually exclusive.

The definition of rent which is contained in Section 202 (e) of the Housing and Rent Act of 1947 is as follows:

> SEC. 202 (e) The term "rent" means the consideration, including any bonus, benefit or gratuity demanded or received for or in connection with the use or occupancy of housing accommodations, or the transfer of a lease of housing accommodations.

The same definition has been included in the various rent control regulations since they were first issued under the Emergency Price Control Act of 1942 except that the words "in connection with" were added in September of 1944 (See Section 13 (10) of Rent Reguation for Housing (9 F. R. 10633)), obviously to conform more closely to the definition of rent contained in the Emergency Price Control Act of 1947 which is as follows:

> SEC. 302 (b) The term "rent" means the consideration demanded or received in con-

nection with the use or occupancy or the transfer of a lease of any housing accommodations (50 U. S. C. App. 942 (g)).

The definitions of rent in Section 202 (e) of the Housing and Rent Act of 1947 and in Section 13 (10) of the Rent Regulation for Housing (9 F. R. 11335) differ from the definition in the Emergency Price Control Act of 1942 only in that they spell out certain types of consideration included but not specified in that act. The fact that Congress later adopted the language of the regulation clearly demonstrates its approval of that language (Cf. *Woods* v. *Petchell,* 175 F. 2d 202, 208 (C. A. 8); *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Boehm* v. *Commissioner,* 326 U. S. 287, 292; *United Labor Committee* v. *Woods,* 175 F. 2d 967, 969; *Woods* v. *Oak Park Chateau Corporation,* 179 F. 2d 611, 613).

The question then becomes: Did the owner of the house in which 1760–A Filbert Street was located receive a consideration including a "bonus, benefit, or gratuity" from Emmanuel Leres in return for Leres' occupation of the housing accommodation? The answer, of course, is that he received the services Leres performed as janitor. Leres' services were a benefit to him and the consideration which Leres gave in lieu of money.

"Rent may consist of something besides money and may be payable in the form of labor." OPA Interpretation 4–V–4 issued December 2, 1942; revised, July 1, 1945—Rent Regulation for Housing, p. 29 issued July 1, 1945.

Accordingly, under the Act, Leres paid rent and the fact that he did not pay it in money does not make his occupancy any the less a rental.

This is true even though, as is the case here, the rented accommodation was previously exempt from rent control. The Rent Regulation for Housing (9 F. R. 11335) and the Controlled Housing Rent Regulation (14 F. R. 5711) exempt certain categories of rented housing from control, as the Price Administrator was authorized to do by the Emergency Price Control Act. These, as listed in Section 1 (b) included accommodations occupied by farming tenants working on the farm where the housing was located, and by service employees such as Leres, to whom space was provided as part or all of his compensation; accommodations otherwise controlled; entire structures of more than 25 rooms rented together; accommodations rented to the United States acting by the National Housing Agency, and certain resort housing. Such an exemption did not mean that the accommodations were not rented but merely that, for administrative reasons, they were not subject to control under the Rent Regulation for Housing.

When the Housing and Rent Act of 1947 became effective it decontrolled certain categories of housing accommodations including housing which was not *rented* (other than to the immediate family of the landlord) [2] for any successive twenty-four month period between February 1, 1945 and March 30, 1948,

[2] This word was originally "occupant" but was changed to landlord in 1948.

both dates inclusive.[3] However, the word used was "rented" and not "controlled". For this reason the Office of the Housing Expediter took the position that housing previously exempt was subject to rent control when the exempt usage terminated.

This is the position consistently taken by the Office of the Housing Expediter and set forth in an official interpretation issued on August 25, 1948 and published in the Federal Register on October 2, 1948 (13 F. R. 5706, 5787). This interpretation is as follows:

> 9. *Housing accommodations which were exempt from rent control during two-year period.* Where during the two-year period housing accommodations were rented under circumstances which caused the renting to be exempt from the rent regulations, the mere fact that such an exemption existed does not result in decontrol. For example, where housing accommodations were occupied during the two-year period by a janitor as part of the compensation he received for his services as janitor, the housing accommodations, so long as this situation existed, were exempt from the rent regulations. If, however, after expiration of the two-year period, the housing accommodations are no longer occupied by a janitor under such an arrangement, but are rented to a tenant under an ordinary rental agreement, the exemption ceases to apply, and the question arises whether they are decontrolled on the basis that they had not been "rented" during

[3] These dates are the ones established by the 1948 Act and were in effect when suit was brought.

the two-year period. Such housing accommodations are not decontrolled on that basis because, even though they were exempt during the two-year period, they were rented during that period to a person who was not a member of the landlord's immediate family.

Another example of the same principle is the following: A college dormitory was occupied by students during the two-year period under circumstances which made rooms exempt from rent control. After the two-year period, the college proposes to rent the rooms in the structure to professors or other persons on an ordinary landlord-tenant basis. Such a renting would be subject to rent control because, although the rooms in the dormitory were exempt during the two-year period, they were in fact rented to persons other than members of the landlord's immediate family.

Official interpretations of a regulation are entitled to controlling weight unless plainly erroneous or inconsistent with the Act. See *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 413, where the Court said:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of control-

> ing weight unless it is plainly erroneous or inconsistent with the regulation.

See also, *Porter* v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431, 433 (C. A. 9), cert. den. 329 U. S. 720, in which this Court in applying OPA interpretations of its own regulations said:

> Since such administrative construction is not irrational, its interpretations are binding upon the courts.

See, too, *Woods* v. *Macken*, 178 F. 2d 511 (C. A. 4th).

The fact that the language of the regulation has been incorporated into the Housing and Rent Act of 1947 does not appear to us to detract from the force of this principle. However, if the Expediter had been interpreting the language of a statute which was not also the language of a regulation issued before and continuing in effect after the passage of the Act, the interpretation would still be entitled to great weight. (See *Woods* v. *Petchell, supra,* and *Woods* v. *Oak Park Chateau Corporation, supra*).

That this interpretation is not irrational is demonstrated by Judge Weinberger's opinion in *Woods* v. *Lansdowne,* 86 F. Supp. 811 (S. D. Cal., C. D.) and Judge Erskine's opinion in this case both of which, after careful consideration, determine that apartments occupied by an employee of the owner as all or part of his compensation have been rented under the Housing and Rent Act of 1947, as amended. There have as yet been no appellate court decisions on this point since the amendment is of comparatively recent origin.

Appellants cite the cases of *Schumann* v. *California Cotton Credit Corp.,* 105 Cal. App. 136, 141; *Maio* v. *Borrell,* 83 N. Y. S. (2d) 532; *Adcock* v. *Smith,* 37 S. W. 91 and *Prince* v. *Davis,* 87 N. Y. S. (2d) 600, 602.

Schumann v. *California Cotton Credit Corp.* and *Adcock* v. *Smith* are apparently cited merely to establish that Leres' occupancy of the apartment constituted his "wages," a point with which we do not quarrel.

The two New York cases cited are lower state court opinions in connection with summary dispossess proceedings—one in the City Court of Mt. Vernon and one in that of New Rochelle. In *Maio* v. *Borrell,* the distinction between the right of a subsequent purchaser to dispossess the former superintendent and the question of whether the apartment he occupied had been rented was clearly drawn. The Court held that for eviction purposes under local law, the new owner was not the landlord of the superintendent.

In *Prince* v. *Davis,* 87 N. Y. Supp. 2d 600, the Court determined that the relationship of employer-employee and that of landlord and tenant could not co-exist under local law, and that since the apartment had been occupied by an employee it could not have been rented.

Neither of these cases takes into consideration the opinion of the Court of Appeals for the Second Circuit in the case of *Fleming* v. *Chapman,* 161 F. 2d 345, in which Judge Clark held a divorced wife to be the tenant of her husband under the New York Rent Control Regulations which contained the same defini-

tion of rent as that here under consideration. The Court said:

> * * * The applicable Rent Regulations for the New York City Defense Rental Area, 8 F. R. 13914, are quite inclusive, and do not rest merely on some formal consensual arrangement of leasing. Compare *Pfalzgraf* v. *Voso,* 184 Misc. 575, 55 N. Y. S. 2d 171, 173; *Da Costa* v. *Hamilton Republican Club of Fifteenth Assembly Dist.,* 187 Misc. 865, 65 N. Y. S. 2d 500, 503. Thus they define a "landlord" to include a "person receiving or entitled to receive rent for the use or occupancy of any housing accommodations," a "tenant" to include a "person entitled to the possession or to the use or occupancy" of such accommodations, and "rent" to include any "benefit * * * received for or in connection with the use or occupancy of housing accommodations." Id. § 13 (a) (8) (9) (10). Here defendant's own acts made it indisputable that the transactions came within these broad definitions. * * *

In so holding, the Court of Appeals was applying the recognized rule that where a federal statute prescribes a universal rule its application is not dependent on local law. The federal rule established by the Housing and Rent Act applies universally. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111; *Woods* v. *Petchell,* 175 F. 2d 202 (C. A. 8); *Woods* v. *Krizan,* 176 F. 2d 667 (C. A. 8); and *Case* v. *Bowles,* 327 U. S. 92 affirming 149 F. 2d 777 (C. A. 9). In addition to *Fleming* v. *Chapman, supra,* there is *Fleming* v. *Simms,* 164 F. 2d 153 (C. A. 5) where the Court distinguished between the

use of the terms "landord" and "tenant" under the common law and under the Rent Control legislation and applied the broader definitions of the latter legislation. The Court below was clearly justified in applying the broad statutory definition of rent in the manner in which it did in order to achieve more fully the salutary purposes of the Act.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be affirmed since on the admitted facts Emmanuel G. Leres was permitted to occupy Apartment 1760–A in return for his services as manager which services constituted the rent paid for the apartment. Since the apartment was rented during the statutory period it was not decontrolled under the provisions of the Housing and Rent Act of 1947 and, therefore, the judgment should be affirmed.

Respectfully submitted.

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No. 12,494

IN THE

United States Court of Appeals

For the Ninth Circuit

F. E. LEITNER, also known as S. F. Leitner, also known as Frederick Leitner, RAPHAEL PORTA, and WILLIAM E. BARDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

ARGUMENT.

I.

As appellee has pointed out appellants specified three points on which they intend to rely on this appeal, mainly:

(1) The motion for summary judgment was improper because there was a genuine issue of material fact.

(2) The record shows that the premises involved were decontrolled because they were not

rented from February 1st, 1945 to March 30th, 1948, both dates inclusive.

(3) The interrogatories proposed by appellants and ordered stricken by the court were properly directed to issues of material facts in the case.

Appellee declares that appellants' brief is directed solely to a slightly modified version of their second point, namely, that the premises were decontrolled because they were not rented for twenty-four consecutive months between February 1, 1945 and March 30, 1948 and that appellants must therefore be considered to have abandoned points 1 and 3.

Both parties agree that the controlling question on this appeal is whether or not the premises known and designated as 1760-A Filbert Street, San Francisco, California, were "rented" in spite of the fact that the tenant occupying the premises namely, Emmanuel G. Leres, was a servant of the then owner of the premises Mr. A. Marchetta and received the apartment as part of his compensation.

Appellee admits that in considering whether or not the pleadings, affidavits, admissions and answers to interrogatories presents solely a question of law, if there is any conflict of the affidavits the affidavit of the appellants must be taken as true. (Appellee's Brief, pp. 5 and 6.)

This is another way of stating that if upon the facts shown in appellants' affidavit the law gives them a defense to appellee's action and if the facts

stated in appellants' affidavits are contradictory to the facts stated in the papers relied upon by appellee a question of material fact does exist.

Such is the situation here. There is a direct conflict between the facts relied upon as disclosed by the papers filed in support of appellee's motion for summary judgment and the facts relied upon by the appellants as disclosed by the affidavits in opposition to the motion for summary judgment. The District Court of Appeal recognized this but declared "but that, assuming the facts to be as alleged or admitted by the appellants the only question remaining is one of law. This appears to be the case, and the only question for this Court is whether, under the applicable sections of the statute, the premises in question were subject to maximum rental ceiling during the period of January 1st, 1948 to and including February 1st, 1949."

We pointed this out in our opening brief when we stated the rule to be that a summary judgment can only be granted where there is no genuine question of material fact and the sole question remaining is one of law for the Court. (Appellants' Opening Brief, p. 3.)

We pointed it out further when we stated that under that rule the Court was required to take as true the testimony contained in the affidavit of appellants in opposition to the motion for summary judgment in determining whether or not the sole issue was one of law. That statement is true where there is a conflict in the testimony disclosed by the papers on file and

considered by the Court in determining the propriety of a motion for summary judgment.

We have therefore urged upon this Court that a material question of fact does exist between the parties and that the sole question before the Court is not one of law. Of course, our subsequent discussion as to whether or not, under the facts disclosed by appellants' affidavit in opposition to the motion for summary judgment there existed the relationship of landlord and tenant or solely that of employer and employee refers back and relates to the one question namely, whether or not there exists a material question of fact.

As to the third point on appeal namely, the point relative to the interrogatories proposed by appellants no argument is needed to be advanced to this Court on that issue for the reason that if the motion were improperly granted the District Court's action in striking the interrogatories was error. If, in fact, there was no renting as contemplated by the Housing and Rent Control Act of 1947, then the District Court erred in striking the interrogatories of appellants. The Court's action in that regard stands or falls upon a decision of the main question involved in this appeal.

Under those circumstances therefore can it be considered that the appellants have abandoned points one and three on this appeal.

II.

Appellee in advancing the contention that where an employee is hired by his employer and given living quarters either in the form of a room or an apartment as all or part of his compensation, such a payment of wages by the employer in fact constitutes rent, rest its position mainly upon the interpretation of the Housing Expediter as set forth on page 9 of its brief. In resting upon this interpretation it quotes the familiar rule that an administrative interpretation of law must be given great weight whereas the duty of the administrative officer or body is to interpret the law and act under it unless the interpretation is plainly erroneous or inconsistent with the law.

In this case the interpretation relied upon is contrary to the established law. It must be remembered that the Housing and Rent Control Act of 1947 has not set up different rules for the creation of a landlord tenancy relationship than has heretofore existed under the local law. It has merely sought to regulate that relationship after it has once been created.

This is evidenced by the definitions contained in the act itself. Thus section 202(e) of the Housing and Rent Act of 1947, provides:

> "The term 'rent' means the consideration, including any bonus, benefit or gratuity demanded or received *for or in connection with the use or occupancy of housing accommodations, or the transfer of a lease of housing accomodations.*"

In 15 Cal. Jur. 600 rent is defined as follows:

> "In the broad legal sense of the term, rent is a return or a compensation for the use of property, or, as used in this article of real property."

There is therefore no change in the relationship of landlord and tenant under the Rent and Housing Act of 1947 which was unknown to the local law. It is therefore apparent that Congress had no intention to create a relationship different from that known under the local law and the definitions and rules of law existing at the time of the enactment of the Housing and Rent Act of 1947 still prevail in determining whether the relationship of landlord and tenant exists.

That being so the law laid down in *Maio v. Borrell,* 83 N.Y.S. (2d) 532, and in *Prince v. Davis,* 87 N.Y. Supp. (2d Series) 600, applies in determining whether or not the relationship of landlord and tenant exists under the facts as disclosed by the affidavits of the appellants in the proceeding on summary judgment.

These cases, although lower state Court opinion, declare the law as it has existed in the various states through the Union. That law is declared in 35 Corpus Juris, 955, Section 13, as follows:

> "The relation of landlord and tenant is clearly distinguishable from that of master and servant, the principal distinction being in the possession by the tenant of an estate in the demised premises, which is lacking in the case of a servant. The question depends upon the nature of the holding, whether it is exclusive and independent of, and in

no way connected with, the service, or whether it is so connected, or is necessary for its performance. The right of occupancy or possession of a servant or employee under his contract of employment or service such as is necessary for, or incident to, the performance of the services to be rendered by him, does not create the relation of landlord; nor, wherein employee is allowed to occupy his employer's premises does he become a tenant, in case the employer reserves general control and supervision over the premises so occupied."

In this case the affidavit of appellants, with the affidavit of Leo Marchetti, attached, shows that the occupant of the premises 1760-A was employed as a manager of the apartment house of 1760-1770 Filbert Street and that he occupied apartment 1760-A Filbert Street as compensation for his employment; that his duties were that of manager of that complete apartment house and his duties are set forth in some detail in the affidavit of Leo Marchetti.

It therefore appears,

First: That he was an employee of Leo Marchetti; Second: That his compensation was the use of this apartment; Third: That the occupancy of the apartment was necessary to the performance of his duties as manager and incidental to his employment as manager, it being necessary inasmuch as his presence was always required in the apartment and it being incidental since it was a part of his compensation and he would only have received the use of the apartment as

an employee and not otherwise; Fourth: The employer retained control over the apartment because since the relationship of landlord and tenant did not exist the employee was required to surrender possession of the apartment whenever the employer terminated the master and servant relationship.

Under the circumstances therefore disclosed in the affidavits of the appellants herein there was no relationship of landlord and tenant but a relationship of employer and employee. Under the express provisions of the Housing and Rent Control Act of 1947, since the apartment in question had not been rented for the twenty-four-month period specified by that Act this apartment was decontrolled and the judgment should be reversed.

Dated, San Francisco, California,
June 21, 1950.

Respectfully submitted,
JOHN F. O'SULLIVAN,
Attorney for Appellants.